FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS

JANUARY 1, 1977 TO JUNE 30, 1977

PUBLISHED BY THE COMMISSION

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MEMBERS OF THE FEDERAL TRADE COMMISSION AS OF JUNE 30, 1977

MICHAEL PERTSCHUK, *Chairman.*
Took oath of office April 21, 1977.

PAUL RAND DIXON.
Took oath of office March 21, 1961.

ELIZABETH HANFORD DOLE.
Took oath of office December 4, 1973.

CALVIN J. COLLIER.
Took oath of office March 24, 1976.

DAVID A. CLANTON.
Took oath of office August 26, 1976.

JOHN F. DUGAN, *Acting Secretary.*[1]

CAROL M. THOMAS, *Secretary.*
Took oath of office June 20, 1977.

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1 From December 6, 1976 to June 19, 1977.

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In the cases reported herein where there is an Initial Decision by an Administrative Law Judge and/or an Opinion by the Commission, boldface, bracketed numbers appear. Those numbers refer to the page numbers of the original Commission document.

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FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

REVLON, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Dockets C-2868 and C-2869. Complaints, Jan. 3, 1977 — Decisions, Jan. 3, 1977

Consent order requiring a New York City manufacturer, seller and distributor of cosmetics and ethical drugs, and its Cincinnati, Ohio, and Chicago, Ill., subsidiaries, among other things, to cease misrepresenting the safety, efficacy and content of hair straightening products and making unsubstantiated product claims. Further, the order requires respondents to make specific warning disclosures in advertising and on package labeling and requires the destruction of all displays and packaging which does not include the appropriate warning disclosures.

Appearances

For the Commission: *Sharon S. Armstrong.*

For the respondents: *Sidney S. Rosdeitcher, Paul, Weiss, Rifkind, Wharton & Garrison,* New York City.

COMPLAINT AS TO REVLON, INC., DOCKET C-2868

The Federal Trade Commission, having reason to believe that Revlon, Inc. and Revlon-Realistic Professional Products, Inc., corporations, hereinafter sometimes referred to as respondents, have violated Sections 5 and 12 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent Revlon, Inc. (Revlon) is a Delaware corporation with its office and principal place of business located at 767 Fifth Ave., New York, New York.

Respondent Revlon-Realistic Professional Products, Inc. (Realistic) is an Ohio corporation with its offices and principal place of business located at 3274 Beekman St., Cincinnati, Ohio.

All allegations in this complaint stated in the present tense include the past tense.

PAR. 2. Respondent Revlon manufactures, advertises, offers for sale, sells and distributes cosmetics and ethical drugs. It controls the

business operations and policies of Realistic, its wholly-owned subsidiary, and is responsible for the acts and practices of Realistic.

Respondent Realistic, a wholly-owned subsidiary of respondent Revlon, manufactures, advertises, offers for sale, sells and distributes Revlon Realistic Protein Permanent Creme Relaxer (Realistic Relaxer), a cosmetic, as that term is defined in the Federal Trade Commission Act, as amended. Realistic relaxer is an emulsion which contains as its active ingredient sodium hydroxide, commonly known as lye. The emulsion is applied to the hair, rinsed from the hair, and neutralized with a shampoo. Realistic relaxer is sold separately and in kits with shampoo. Realistic relaxer is used by professional beauticians for the purpose of straightening curly hair.

PAR. 3. Revlon, through its wholly-owned subsidiary Realistic, and Realistic, cause Realistic relaxer, when sold, to be sent from Realistic's place of business in Ohio to beauty salons and other purchasers located in various other States of the United States and the District of Columbia. Thus, Revlon and Realistic maintain a substantial course of trade in said product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of their business, respondents disseminate and cause to be disseminated certain advertisements concerning Realistic relaxer (1) by United States mail, magazines of interstate circulation and by various other means in or having an effect upon commerce, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Realistic relaxer; (2) by various means, for the purpose of inducing, or which are likely to induce, the purchase in or having an effect upon commerce of Realistic relaxer, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. Typical and illustrative of the statements and representations made in respondents' advertisements, but not all inclusive thereof, are the following:

> Mild and safe.
>
> It contains protein protectors to help prevent scalp irritation, cuticle and unnecessary hair damage.
>
> Our exclusive Protein Formula actually helps restore lost protein and helps strengthen hair.
>
> It has a special proteinized creme formula that achieves permanent hair relaxation and helps protect the condition of your hair.
>
> Built in organic protein conditioning enrichens and silkens hair like never before.

PAR. 6. Through the use of the above-quoted statements and representations, and others of similar import and meaning not expressly set forth herein, respondents represent, directly or by implication, that:

A. Realistic relaxer is safe and is mild to scalp and skin.

B. Realistic relaxer helps strengthen hair.

C. Realistic relaxer contains protein which

1. helps prevent scalp irritation; and

2. helps prevent hair damage.

PAR. 7. In truth and in fact:

A. Realistic relaxer is not safe nor is it mild to scalp and skin. Sodium hydroxide, the active ingredient in Realistic relaxer, is a primary skin irritant. It is caustic to skin and breaks down the cells which form the epidermis. Realistic relaxer in some instances causes skin and scalp irritation and burns. It can also cause eye irritation and may impair vision temporarily.

B. Realistic relaxer does not strengthen hair. The sodium hydroxide in Realistic relaxer straightens hair by breaking down the cells of the hair shaft. The relaxing process weakens hair, and, in some instances, makes it brittle and causes partial or total hair loss.

C. Realistic relaxer does not contain protein to help prevent scalp irritation or hair damage. The ingredient used is Maypon 4c, a detergent derived from protein which has been altered so that it no longer retains the chemical or physical properties of protein. Therefore, at the time the relaxer is used, it contains no protein to help prevent scalp irritation or hair damage.

Therefore, the advertisements, statements and representations referred to in Paragraphs Five and Six are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, as amended, and are false, misleading and deceptive.

PAR. 8. At the time the representations set forth in Paragraph Six were made, respondents had no reasonable basis from which to conclude that such representations were true. Therefore, the advertisements and representations set forth in Paragraphs Five and Six are deceptive and unfair.

PAR. 9. Respondents advertise Realistic relaxer without disclosing that:

A. Realistic relaxer can cause skin and scalp irritation, hair breakage and eye injury.

B. Directions must be followed carefully.

Such facts are material and, if known to potential customers who are

professional beauticians, would be likely to affect their decision to purchase Realistic relaxer for professional use. Similarly, such facts, if known to potential customers who purchase hair straightening services from professional beauticians, would be likely to affect their decision to have their hair straightened with Realistic relaxer.

Therefore, respondents' advertisements of said product are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, as amended, and are false, misleading and deceptive.

PAR. 10. In the further course and conduct of their business, respondents Revlon and Realistic utilize the product name "Revlon Realistic Protein Creme Relaxer." The use of said product name has the tendency and capacity to lead potential purchasers to believe such relaxer contains protein at the time the relaxer is applied to the hair.

In truth and in fact, the ingredient used is Maypon 4c, a detergent derived from protein which has been altered so that it no longer retains the chemical or physical properties of protein. Therefore, said respondents' use of the word "protein" in their product name is deceptive and unfair.

PAR. 11. In the further course and conduct of their business, respondents offer for sale, sell and distribute Realistic relaxer without disclosing on the retail product package of said product the following information:

A. The product contains sodium hydroxide (lye). It can cause skin and scalp burns, hair loss, and eye injury. Directions must be followed carefully.

B. The product should not be used if scalp is irritated or injured.

C. The product should not be used on bleached or permanently colored hair. If hair has been relaxed, the relaxer should be applied only to new growth, as described in the directions.

D. If the relaxer causes skin or scalp irritation, it should be rinsed out immediately and washed with a shampoo in the kit. If irritation persists, a physician should be consulted.

E. If the relaxer gets into eyes, eyes should be rinsed immediately and a physician should be consulted.

Such facts are material and, if known to potential customers who are professional beauticians, would be likely to affect their decision to purchase Realistic relaxer for professional use. Therefore, failure to disclose said material facts on the product package is an unfair and deceptive act or practice.

PAR. 12. The use by respondents of the aforesaid false, misleading

and deceptive and unfair statements, representations, acts and practices and the dissemination of the aforesaid "false advertisements" has the capacity and tendency to mislead members of the consuming public and professional beauticians into the erroneous and mistaken belief that said statements and representations are true, and into the purchase of substantial quantities of Realistic relaxer by reason of said erroneous and mistaken belief.

PAR. 13. In the course and conduct of their business, respondents are in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of products of the same general kind and nature as sold by respondents.

PAR. 14. The aforesaid acts and practices of respondents, including the dissemination of "false advertisements," are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts or practices in or affecting commerce and unfair methods of competition in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

COMPLAINT AS TO DELUXOL LABORATORIES, INC., DOCKET C-2869

The Federal Trade Commission, having reason to believe that Deluxol Laboratories, Inc. and Revlon, Inc., corporations, hereinafter sometimes referred to as respondents, have violated Sections 5 and 12 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent Deluxol Laboratories, Inc. (Deluxol) is an Illinois corporation with its office and principal place of business located at 1130 E. 95th St., Chicago, Illinois.

Respondent Revlon, Inc. (Revlon) is a Delaware corporation with its office and principal place of business located at 767 Fifth Ave., New York, New York.

All allegations in this complaint stated in the present tense include the past tense.

PAR. 2. Respondent Deluxol, a wholly-owned subsidiary of respondent Revlon, manufactures, advertises, offers for sale, sells and distributes French Perm Creme Hair Relaxer (French Perm), a cosmetic, as that term is defined in the Federal Trade Commission Act, as amended. French Perm is an emulsion which contains as its active ingredient sodium hydroxide, commonly known as lye. The emulsion is applied to the hair, rinsed from the hair, and neutralized with a shampoo. French Perm is sold separately and in kits with

shampoo and setting lotion. French Perm is used by consumers and professional beauticians for the purpose of straightening curly hair.

Respondent Revlon manufactures, advertises, offers for sale, sells and distributes cosmetics and ethical drugs. It controls the business operations and policies of Deluxol, its wholly-owned subsidiary, and is responsible for the acts and practices of Deluxol.

PAR. 3. Revlon, through its wholly-owned subsidiary Deluxol, and Deluxol, cause French Perm, when sold, to be sent from Deluxol's place of business in Illinois to beauty salons and other purchasers located in various other States of the United States and the District of Columbia. Thus, Revlon and Deluxol maintain a substantial course of trade in said product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of their business, respondents disseminate and cause to be disseminated certain advertisements concerning French Perm (1) by United States mail, magazines of interstate circulation and by various other means in or having an effect upon commerce, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of French Perm; (2) by various means, for the purpose of inducing, or which are likely to induce, the purchase in or having an effect upon commerce of French Perm, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. Typical and illustrative of the statements and representations made in respondents' advertisements, but not all inclusive thereof, are the following:

> Why has French Perm been the standard of excellence in Salon Hair Relaxers since 1962? The secret is its special *buffering ingredients* that provide three superior processing advantages. (1) Gets the right working speed for efficiency, control and confidence — not too fast, not too slow. (2) Its *buffered action* pampers the hair shaft during processing. It's blended with protein and other mellowing ingredients to leave hair feeling like *hair:* lively, soft and shining! (3) Allows exceptional patron comfort. (Hurray!)

PAR. 6. Respondents further promote the sale of French Perm through statements and representations made by various other means, including labeling. Typical and illustrative of the statements and representations made in respondents' labeling, but not all inclusive thereof, are the following:

> Contains protein for superior hair condition.
>
> You'll love its gentle "buffered action" that leaves hair lively, gleeming, easy to style.
>
> No burn.

So gentle, needs no protective base!

PAR. 7. Through the use of the above-quoted statements and representations, and others of similar import and meaning not expressly set forth herein, respondents represent, directly or by implication, that:

A. French Perm is gentle and does not irritate or burn scalp or skin.

B. French Perm contains protein which protects hair during the relaxing process and which produces superior hair condition.

PAR. 8. In truth and in fact:

A. French Perm is not gentle, and in some instances it causes scalp and skin irritation and burns. Sodium hydroxide, the active ingredient in French Perm, is a primary skin irritant. It is caustic to skin and breaks down the cells which form the epidermis. It can also cause eye irritation and may impair vision temporarily.

B. French Perm does not contain protein which protects hair or produces superior hair condition. The ingredient used is Maypon 4c, a detergent derived from protein which has been altered so that it no longer retains the chemical or physical properties of protein. Therefore, at the time the relaxer is used, it contains no protein to protect hair or produce superior hair condition.

Furthermore, the sodium hydroxide in French Perm straightens hair by breaking down the cells of the hair shaft. The relaxing process weakens hair, and, in some instances, makes it brittle and causes partial or total hair loss.

Therefore, the advertisements, statements and representations referred to in Paragraphs Five and Seven are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, as amended. The advertisements, statements and representations referred to in Paragraphs Five, Six and Seven are false, misleading and deceptive.

PAR. 9. At the time the representations set forth in Paragraph Seven were made, respondents had no reasonable basis from which to conclude that such representations were true. Therefore, the advertisements and representations set forth in Paragraphs Five, Six and Seven are deceptive and unfair.

PAR. 10. Respondents advertise French Perm without disclosing that:

A. French Perm can cause skin and scalp irritation, hair breakage and eye injury.

B. Directions must be followed carefully.

Such facts are material and, if known to potential customers, would be likely to affect their decision to purchase French Perm. Similarly, such facts, if known to potential customers who purchase hair straightening services from professional beauticians, would be likely to affect their decision to have their hair straightened with French Perm.

Therefore, respondents' advertisements of said product are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, as amended, and are false, misleading and deceptive.

PAR. 11. In the further course and conduct of their business, respondents offer for sale, sell and distribute French Perm without disclosing on the retail product package of said product the following information:

A. The product contains sodium hydroxide (lye). It can cause skin and scalp burns, hair loss, and eye injury. Directions must be followed carefully.

B. The product should not be used if scalp is irritated or injured.

C. The product should not be used on bleached or permanently colored hair. If hair has been relaxed, the relaxer should be applied only to new growth, as described in the directions.

D. If the relaxer causes skin or scalp irritation, it should be rinsed out immediately and washed with a shampoo in the kit. If irritation persists, a physician should be consulted.

E. If the relaxer gets into eyes, eyes should be rinsed immediately and a physician should be consulted.

Such facts are material and, if known to potential customers, would be likely to affect their decision to purchase French Perm. Therefore, failure to disclose said material facts on the product package is an unfair and deceptive act or practice.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive and unfair statements, representations, acts and practices and the dissemination of the aforesaid "false advertisements" has the capacity and tendency to mislead members of the consuming public and professional beauticians into the erroneous and mistaken belief that said statements and representations are true, and into the purchase of substantial quantities of French Perm by reason of said erroneous and mistaken belief.

PAR. 13. In the course and conduct of their business, respondents are in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of products of the same general kind and nature as sold by respondents.

PAR. 14. The aforesaid acts and practices of respondents, including the dissemination of "false advertisements," are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts or practices in or affecting commerce and unfair methods of competition in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered comments filed pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

A. Respondent Revlon, Inc. (Revlon) is a Delaware corporation with its office and principal place of business located at 767 Fifth Ave., New York, New York.

Respondent Revlon-Realistic Professional Products, Inc. (Realistic) is an Ohio corporation with its office and principal place of business located at 3274 Beekman St., Cincinnati, Ohio.

Respondent Deluxol Laboratories, Inc. (Deluxol) is an Illinois corporation with its office and principal place of business located at 1130 E. 95th St., Chicago, Illinois.

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B. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondents Revlon, Realistic and Deluxol, corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of Revlon Realistic Protein Permanent Creme Relaxer (Realistic Relaxer), French Perm Creme Hair Relaxer (French Perm relaxer) or any hair care product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing in writing, orally, visually, or in any other manner, directly or by implication, that:

1. Any hair straightening product is comfortable, gentle or safe.

2. Any hair straightening product is mild, *provided, however,* that respondents may use the words "mild strength" or "mild formula" to designate those hair straightening products which contain a smaller percentage of the active ingredient or ingredients than other hair straightening products manufactured by respondents.

3. Any hair straightening product helps improve hair strength.

4. Any hair straightening product conditions or helps condition hair or improves the condition of hair, *provided, however,* that respondents may represent that such products make or help make hair more manageable, if at the time the representation is made, respondents have in their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representations.

5. Any hair care product contains protein, unless, at the time the representation is made, respondents have a reasonable basis, consisting of competent and reliable controlled tests, to establish that at the time it is used, such product contains protein or partially hydrolyzed animal or vegetable protein having at least a mean molecular weight of 1000. This definition does not include any derivative of protein or partially hydrolyzed animal or vegetable protein obtained through the condensation reaction process of protein or partially hydrolyzed animal or vegetable protein with other chemicals.

B. Representing, in any manner, directly or by implication, the efficacy of any hair straightening product or the ingredients therein,

unless, at the time such representation is made, respondents have in their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation; or misrepresenting in any manner the nature of any such product or its ingredients or the effect of any such product or its ingredients on hair or skin or any other structure of the body.

C. Representing, in any manner, directly or by implication, the safety of any hair care product or the ingredients therein, unless at the time such representation is made, respondents have in their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation. For purposes of this provision, failure to disclose facts shall not constitute a representation.

D. Disseminating or causing to be disseminated any advertisement of Realistic relaxer, French Perm relaxer, or any hair straightening product of similar composition, which fails to disclose, clearly and conspicuously with nothing to the contrary or in mitigation thereof, the following statement exactly as it appears below:

> "WARNING: Follow directions carefully to avoid skin and scalp irritation, hair breakage and eye injury."

II

It is further ordered, That respondents Revlon, Realistic, and Deluxol, corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of Realistic relaxer, French Perm relaxer, or any hair care product, do forthwith cease and desist from:

A. Disseminating or causing to be disseminated by United States mail or by any means in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of any such product, any advertisement which contains a representation prohibited by Paragraph I of this order or which omits a disclosure for such product required by Paragraph I of this order.

B. Disseminating or causing to be disseminated by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of any such product in or having an effect on commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, any advertisement which contains a represen-

tation prohibited by Paragraph I of this order or which omits a disclosure for such product required by Paragraph I of this order.

III

It is further ordered, That respondents Revlon, Realistic, and Deluxol, corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale, or distribution of Realistic relaxer, French Perm relaxer, or any hair straightening product of similar composition in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from failing to include clearly and conspicuously on the information panel of the product package, on the package insert, and on the label of the relaxer container of any such product, with nothing to the contrary or in mitigation thereof, the following disclosures exactly as they appear below:

WARNING: 1. This product contains sodium hydroxide (lye). You must follow directions carefully to avoid skin and scalp burns, hair loss, and eye injury.
2. Do not use if scalp is irritated or injured.
3. Do not use on bleached hair. Do not use on permanently colored hair which is breaking, splitting or otherwise damaged. For hair that has been permanently colored and shows no sign of damage, use only mild strength formula.
4. If you have previously relaxed your hair, relax only the new growth, as described in the directions.
5. If the relaxer causes skin or scalp irritation, rinse out immediately and wash with the shampoo in the kit. If irritation persists or if hair loss occurs, consult a physician.
6. If the relaxer gets into eyes, rinse immediately and consult a physician.

Provided, however, that if such hair straightening product is offered for sale, sold or distributed without a neutralizing shampoo, respondents will disclose the following in place of Warning No. 5 above:

5. If the relaxer causes skin or scalp irritation, rinse out immediately and wash with a non-alkaline shampoo (pH below 7). If irritation persists, or if hair loss occurs, consult a physician.

IV

It is further ordered, That respondents Revlon, Realistic, and Deluxol shall cease and desist from using the work "protein" in the trade name Revlon Realistic Protein Creme Relaxer and the trade names of any hair care product, unless at the time the representation

is made, respondents have a reasonable basis, consisting of competent and reliable controlled tests, to establish that at the time it is used, such product contains protein or partially hydrolyzed animal or vegetable protein having at least a mean molecular weight of 1000. This definition does not include any derivative of protein or partially hydrolyzed animal or vegetable protein obtained through the condensation reaction process of protein or partially hydrolyzed animal or vegetable protein with other chemicals.

V

It is further ordered, That respondents shall instruct each customer to whom they sell Realistic relaxer or French Perm relaxer, to destroy all display advertisements for Realistic relaxer and French Perm relaxer which contain any of the words or representations prohibited by Paragraph I of this order or which fail to made the affirmative disclosures for such products required by Paragraph I of this order. Respondents shall also instruct each of their customers which is a wholesaler to instruct beauty salons and retail stores which may have received such display advertisements to destroy them.

VI

It is further ordered, That respondents shall distribute a copy of this order to their present and future officers, directors, and operating divisions and that respondents secure from each such person a signed statement acknowledging receipt of the order.

VII

It is further ordered, That respondents maintain complete business records relative to the manner and form of their continuing compliance with the terms and provisions of this order. Each record shall be retained by respondents for at least three years after it is made.

VIII

It is further ordered, That respondents notify the Commission at least thirty days prior to any proposed change in respondents, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries, a change in the corporate name or address, or any other change in the corporations which may affect compliance obligations arising out of this order.

IX

It is further ordered, That the respondents herein shall, within 120 days after service of this order, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

IN THE MATTER OF

CALIFORNIA AND HAWAIIAN SUGAR COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2858. Complaint, Jan. 6, 1977 — Decision, Jan. 6, 1977

Consent order requiring a San Francisco, Calif., seller of granulated sugar, and its advertising agency, Foote, Cone and Belding/Honig, Inc., among other things, to cease misrepresenting or making unsubstantiated claims regarding the superiority of their products over that of competing brands.

Appearances

For the Commission: *Ben Aliza* and *Alfred Lindeman.*

For the respondents: *George Link, Brobeck, Phlegee & Harrison,* Los Angeles, Calif. and *Quincy, White, Sidley & Austin,* Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that California and Hawaiian Sugar Company, a corporation, and Foote, Cone & Belding/Honig, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent California and Hawaiian Sugar Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 1 California St., San Francisco, California.

PAR. 2. Respondent Foote, Cone & Belding/Honig, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 55 Francisco St., San Francisco, California.

PAR. 3. Respondent California and Hawaiian Sugar Company is now, and for some time last past has been, engaged in the manufacture, sale and distribution of refined sugars which come within the classification of a "food," as said term is defined in the Federal Trade

Commission Act. Its refined sugars are usually sold for household use under the "C&H" brand.

PAR. 4. Respondent Foote, Cone & Belding/Honig, Inc. is now, and for some time last past has been, the advertising agency of California and Hawaiian Sugar Company, and now and for some time last past, has prepared and placed for dissemination and has caused the dissemination of advertising material, including but not limited to the advertising referred to herein, to promote the sale of California and Hawaiian Sugar Company's refined sugars, which come within the classification of "food," as said term is defined in the Federal Trade Commission Act.

PAR. 5. Respondent California and Hawaiian Sugar Company causes the said products, when sold, to be transported from its place of business in one State of the United States to purchasers located in various other States of the United States. Respondent California and Hawaiian Sugar Company maintains, and at all times mentioned herein has maintained, a course of trade in said products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 6. In the course and conduct of their said businesses, respondents have disseminated, and caused the dissemination of certain advertisements concerning the said refined sugars by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, television and radio broadcasts transmitted by television and radio stations located in various States of the United States, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said product; and have disseminated, and caused the dissemination of, advertisements concerning said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said refined sugars in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. Typical of the statements and representations in said advertisements, disseminated as aforesaid, but not all inclusive thereof, are the following television and radio commercials[1] purporting to be recorded on the scene in supermarkets:

[1] In the scripts of said commercials, the following abbreviations are used:
A = announcer
I = interviewer

(Continued)

FOOTE, CONE & BELDING/HONIG RADIO COPY

CLIENT	C and H Sugar Company	PRO-GRAM	
PROD-UCT	DA Radio Interview #5 - Joyce Pavlovsky	STA/CITY	
TIME	:60	DATE	May 12, 1975

A: Why do women pick *one* brand over *another?* Mrs. Joyce Pavlovsky spelled it out for us in this supermarket interview. . .

I: You picked C and H Sugar and I'm curious: Why do you buy C and H?

R: I buy C and H all the time because it's the finest quality sugar that I can find and this is what I want for my family.

I: What is it about C and H that you like? What does it say for you that makes it different?

R: Well, I know it's a pure product. Pure cane sugar from Hawaii. So I believe it and so I buy it and it's always worked well for me.

I: To me sugar is sugar. All brands are the same.

R: No! To me sugar isn't sugar. 'Cause I've tried other brands.

I: Isn't this other brand pure cane sugar from Hawaii?

R: I don't know because I don't think it says it. And this says it! And I belive it because they wouldn't be allowed to put it on the package unless it were so. Pure cane sugar. So I buy C and H.

I: If you want pure cane sugar from Hawaii, you're sure of getting it with C and H. It says so . . .

R: On the package!

FOOTE, CONE & BELDING/HONIG RADIO COPY

CLIENT	C and H Sugar Company	PRO-GRAM	
PROD-UCT	DA Radio Interview #3 - Joanne Wickley	STA/CITY	
TIME	:60	DATE	5/12/75

A: Does the information on food labels really influence women? Mrs. Joanne Wickley feels pretty strongly about it, as this supermarket interview will show you. . .

I: You picked C and H Sugar. My question is "why?"

R: Well, you know that it's pure cane sugar. Says so right on the package.

I: Aren't all sugars the same? I mean, really, sugar is sugar. Now, there's other brands on the shelf. I mean, isn't that pure cane sugar from Hawaii?

R: I don't know. It doesn't say that on there.

I: And what about C and H? What does that do that makes it different?

R: It tells us where it's from. It tells us that it's pure cane sugar.

I: And really, this impresses you?

R = respondent-consumer
DA = devil's advocate

R: Yes! People read labels these days. They like to know what's in it, where it comes from and we can depend upon it's . . . what it says right here.

I: And you're honestly telling me that there *is* a difference between brands of sugar?

R: There really is.

I: If you want pure cane sugar from Hawaii, you're sure of getting it with C and H.

R: Right.

FOOTE, CONE & BELDING/HONIG TV SCRIPT

CLIENT	C and H Sugar Company	TIME	:30
PRODUCT	Pure Cane Sugar	DATE	June 23, 1975
SPOT NO.	"PACKAGE INFO"	Final - Short form - legal	

1. MAN WITH SHOPPING CART FULL OF PACKAGES (NO BRAND NAMES). HE WHEELS DOWN AISLE TOWARD CAMERA, STOPS AT SUGAR SECTION.	(SILENT, EXCEPT POSSIBLY FOR MUTED STORE SOUNDS.)
2. CU. HE TAKES GENERIC PACKAGE FROM SHELF. TURNS IT OVER AND OVER IN HIS HAND, LOOKING FOR SOMETHING ON THE LABEL.	*ON CAMERA ANNOUNCER* (TO HIMSELF, IN A RATHER DRY, WRY, FLAT VOICE.) It doesn't say. It just doesn't say.
3. HE SHAKES HIS HEAD IN RESIGNATION, SHRUGS AND PUTS PACKAGE BACK.	(TO VIEWER) Did you ever notice, many sugar packages don't tell you *what* the sugar is made from. They just say "granulated." On the other hand -
4. HE TAKES DOWN A C AND H PACKAGE.	most people who make cane sugar - like C and H -proudly. . .
5. SHOW CU LABEL WITH WORDS "PURE CANE SUGAR" AND "HAWAII."	put the word "cane" on every label. Besides that . . . they tell you *where* it *comes* from. Hawaii.
6. MEDIUM. HOLDS C AND H PACKAGE. THEN ANOTHER CU OF PACKAGE.	So, if you want pure cane sugar from Hawaii, you can be *sure* you're getting it with C and H.
7. IN TO CU OF C AND H.	Says so right on the label.

PAR. 8. Through the use of said advertisements and others similar thereto not specifically set out herein, disseminated as aforesaid, respondents have represented, directly and by implication, that:

1. There are differences in granulated sugars.

2. C&H brand granulated sugar derived from Hawaiian sugar cane is different from and superior to other granulated sugars in quality and purity.

In making said representations, respondents have failed to specify any consumer use of said sugar with respect to which C&H brand sugar is significantly different from or superior to other sugar.

PAR. 9. In truth and in fact, with respect to the uses for which consumers generally purchase such sugar:

1. There are no differences in granulated sugars. They are all 99.9 percent sucrose, $C_{12}H_{22}O_{11}$, a carbohydrate.

2. C&H brand granulated sugar derived from Hawaiian sugar cane is not different from or superior to other granulated sugars in quality or purity.

Therefore, the advertisements referred to in Paragraph Seven were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act, and the statements and representations set forth in Paragraphs Seven and Eight were, and are, false, misleading and deceptive.

PAR. 10. In certain commercials, disseminated as aforesaid, respondents have represented, directly and by implication, that certain brands of sugar other than C&H do not disclose what their sugar is made from or where it comes from, and that such nondisclosure is a material fact which implies such competitive brands come from an inferior source of sugar. In truth and in fact, with respect to the uses for which consumers generally purchase such sugar, it is not a material fact that competitive brands of sugar do not disclose what their sugar is made from or where it comes from, and such nondisclosure does not imply that such competitive brands come from an inferior source of sugar. For consumer uses, all granulated sugars are substantially the same regardless of sugar source. They are all 99.9 percent sucrose, $C_{12}H_{22}O_{11}$, a carbohydrate.

Therefore, the advertisements referred to in Paragraph Seven were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act, and the statements, representations and practices set forth in Paragraphs Seven and Ten were, and are, false, misleading and deceptive to consumers, and unfair acts and practices to competitors.

PAR. 11. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent California and Hawaiian Sugar Company has been, and now is, in substantial competition, in commerce, with corporations, firms and individuals in the sale of food products of the same general kind and nature as that sold by respondent.

PAR. 12. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Foote, Cone & Belding/Honig, Inc. has been, and now is, in substantial competition in commerce with other advertising agencies.

PAR. 13. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices and the dissemination of the aforesaid "false advertisements" has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent California and Hawaiian Sugar Company's refined sugars by reason of said erroneous and mistaken belief.

PAR. 14. The aforesaid acts and practices of respondents including the dissemination of "false advertisements," as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices in or affecting commerce and unfair methods of competition in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent California and Hawaiian Sugar Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1 California St., San Francisco, California.

Respondent Foote, Cone & Belding/Honig, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 55 Francisco St., San Francisco, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents California and Hawaiian Sugar Company, a corporation, and Foote, Cone & Belding/Honig, Inc., a corporation, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of granulated sugar packaged for retail consumption, forthwith cease and desist from:

1. Disseminating or causing the dissemination of any advertisement by means of the United States mail or in or having an effect upon commerce by any means, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication:

(A) (i) That there are differences in granulated sugars, or that C&H granulated sugar derived from Hawaiian sugar cane is superior to or different from sugar derived from sugar beets or sugar cane from places other than Hawaii, unless (a) such represented difference or superiority relates to a consumer use of such sugar which is specified in the advertisement, (b) the difference or superiority is substantiated by competent and reliable evidence prior to making the representation, and (c) such substantiation includes competent and reliable evidence that the difference or superiority is discernible to or of benefit to the class of consumers to whom the representation is directed.

(ii) *Provided, however,* that it shall not be a violation of this order to use the phrase "pure cane sugar from Hawaii" as a means of identifying the geographic origin and type of granulated sugar marketed under the C&H brand name in any context wherein the quality of the sugar marketed under the C&H brand is not expressly or implicitly compared with the quality of any other sugar. Where an

advertisement contains the phrase "pure cane sugar from Hawaii" and a depiction of C&H sugar, without any representation referring to any competitor's sugar product, or any representation that C&H sugar possesses a depicted characteristic or quality to a degree different from competitive brands of sugar, the advertisement will not be deemed to contain an implied comparison.

(iii) *It is further provided,* that if an advertisement makes a positive or absolute and truthful representation concerning C&H sugar without any representation concerning any competitor's sugar product, or without any representation that C&H sugar possesses a depicted characteristic or quality to a degree different from competitors' brands of sugar, the advertisement will not be deemed to contain an implied comparison under this order.

(B) That the label, advertising or packaging of any brand of granulated sugar other than C&H does not disclose the source or origin of its sugar, unless the advertisement specifies a consumer use of sugar with respect to which C&H sugar is different from such other sugar and such difference is substantiated by competent and reliable evidence prior to making the representation.

2. Disseminating, or causing the dissemination of, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product, in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any of the representations prohibited in Paragraph 1 above.

Provided, however, that it shall not be considered a violation of this order for Foote, Cone & Belding/Honig, Inc. to make what would otherwise be a false or misleading claim or representation concerning the qualities of C&H sugars or competitive sugars if that respondent shows that it neither had any knowledge of the falsity of or misleading character of such representation nor had any reason to know, nor upon reasonable inquiry could have known its false, deceptive or misleading nature.

It is further ordered, That the respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondents herein shall within sixty

(60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

SALOMON/NORTH AMERICA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2859. Complaint, Jan. 6, 1977 — Decision, Jan. 6, 1977

Consent order requiring a Peabody, Mass., manufacturer and distributor of ski bindings and related ski equipment, among other things, to cease establishing and maintaining resale prices; soliciting the identities of dealers failing to observe respondent's sales policy; threatening the termination of those dealerships; and restricting product sales only to authorized dealers. Additionally, the order requires respondent to indicate on each page of disseminated material containing retail prices, that these prices are suggested or approximate; and to maintain a five-year file containing correspondence and explanations of refusals to deal.

Appearances

For the Commission: *David W. DiNardi.*

For the respondent: *Blair L. Perry* and *John H. Morton, Hale & Dorr,* Boston, Mass.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Salomon/North America, Inc., a corporation, hereinafter referred to as respondent, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended; 15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Salomon/North America, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7 Dearborn Road, Peabody, Massachusetts.

PAR. 2. Respondent has been and is now engaged in the manufacture, sale and distribution of ski bindings and related items, hereinafter referred to as said products. Respondent's products are subsequently distributed and sold to authorized dealers throughout the United States for resale to the general public.

PAR. 3. In the course and conduct of its business as aforesaid,

respondent has been and is now engaged in commerce or its acts and practices affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, in that respondent has sold and caused and now causes said products to be shipped from the state in which they are manufactured or warehoused to other states of the United States for resale and distribution through authorized dealers to the general public.

PAR. 4. Except to the extent that competition has been hampered or restrained as set forth in this complaint, respondent has been and is now in competition with other persons, firms and corporations engaged in the manufacture, sale and distribution of said products.

PAR. 5. Respondent, in combination, agreement or arrangement with certain of its authorized dealers, or with the cooperation or acquiescence of other dealers, has for the last several years been engaged in a planned course of action to fix, establish and maintain certain specified uniform prices at which said products are resold. In furtherance of said planned course of action, respondent has for the past several years engaged in the following acts and practices, among others:

(a) Regularly furnishing its dealers with price lists and necessary supplements thereto containing certain resale or retail prices;

(b) Establishing contracts, agreements and arrangements with its dealers, one or more of whom are located in states which do not have fair trade laws, as a condition precedent to the granting of a dealership, that such dealers will maintain certain resale or retail prices;

(c) Informing its dealers, by direct and indirect means, that respondent expects and requires such dealers to maintain and enforce certain resale or retail prices, or such dealerships will be terminated;

(d) Requiring its dealers to agree not to sell or otherwise supply or furnish said products to anyone who is not an authorized dealer of the respondent;

(e) Soliciting and obtaining from its dealers, cooperation and assistance in identifying and reporting any dealer who advertises, or offers to sell, or sells said products at prices lower than certain resale or retail prices; and

(f) Directing its salesmen, representatives and other employees to secure and report information identifying any dealer who fails to adhere to and maintain certain resale or retail prices.

PAR. 6. By means of such acts and practices, including but not limited to the foregoing, respondent, in combination, agreement, or arrangement with certain of its authorized dealers and with the

acquiescence of other authorized dealers, has established, maintained and pursued a planned course of action to fix and maintain certain resale or retail prices at which said products will be resold.

PAR. 7. The aforementioned acts and practices of respondent have been and are now having the effect of hampering and restraining competition in the resale and distribution of said products, and constitute unfair methods of competition in or affecting commerce, all in derogation of the public interest and in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Salomon/North America, Inc. (Salomon), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business at 7 Dearborn Road, Peabody, Massachusetts.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That Salomon/North America, Inc., a corporation (hereafter Salomon), its subsidiaries, successors and assigns, and its officers and directors and Salomon's agents, representatives and employees, individually or in concert, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, distribution, offering for sale or sale of ski bindings, ski equipment and related items or any other product (hereinafter the "Products") in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Making or enforcing any oral or written contract, agreement or arrangement pursuant to which such dealer, distributor or retailer agrees not to sell the Products at prices less than minimum retail prices established by Salomon.

B. Making or enforcing any oral or written contract agreement or arrangement which restricts the class or type of customer to whom such dealer, distributor or retailer may sell the products.

C. Making or enforcing any oral or written contract, agreement or arrangement which restricts the site or location at which such dealer, distributor or retailer may sell the Products.

D. Making or enforcing any oral or written contract, agreement or arrangement which prohibits such dealer, distributor or retailer from advertising, promoting or offering for sale any of the Products at less than minimum prices specified by Salomon.

E. Requesting or requiring any dealer or prospective dealer, either directly or indirectly, to report any dealer, person or firm who does not adhere to any suggested retail price for any of said Products, or acting on reports so obtained by refusing or threatening to refuse sales of the Products to any dealer, person or firm so reported.

F. Publishing, disseminating or circulating any pricelist, price book, price tag, advertising or promotional material, or other document ("Promotional Material") indicating any resale or retail prices for the Products without stating on each page of such Promotional Material which includes a list or statement of the suggested retail prices of any or all of the Products that the price is a suggested or an approximate retail price.

II

Nothing contained in this order shall be construed as limiting or restricting the rights of Salomon (a) to require that each dealer or retailer who sells the Products at retail shall be fully qualified to perform Proper Fitting Services (as that term is hereafter defined); and (b) to require that each dealer or retailer who sells the Products at retail actually shall provide Proper Fitting Services to retail customers who purchase the Products; and (c) to require that distributors, dealers and retailers refrain from reselling the Products to dealers or retailers who are not fully qualified and willing to provide Proper Fitting Services to retail customers; *provided* that Salomon shall make available to all present and prospective dealers an opportunity for instruction in performing Proper Fitting Services, except where Salomon has lawful business reasons (other than the inability to perform Proper Fitting Services) for not selling the Products to any particular dealer. As used in this paragraph II, the term "Proper Fitting Services" means the mounting and installing of the Products upon the skis of a retail or rental customer, and the fitting and adjustment of the Products to the boots of such customer, in a workmanlike and proper manner, having due regard for the physical qualifications and skiing abilities of such customer, in order to minimize the risk of injury to such customer and other persons and property and to minimize the potential liabilities of Salomon and its distributors, dealers and retailers.

III

It is further ordered, That Salomon shall, within fifty-nine (59) days after service upon it of this order, mail a copy of this order to each of its dealers in the Commonwealth of Puerto Rico, the District of Columbia and in those states which as of February 28, 1975, did not permit fair trade contracts, under cover of the letter annexed hereto as Exhibit A, and furnish the Commission proof of the mailing thereof.

IV

It is further ordered, That Salomon notify the Commission at least thirty (30) days prior to any proposed change in Salomon such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other such change in the corporation which may affect compliance obligations arising out of the order.

V

It is further ordered, That Salomon shall forthwith distribute a copy of this order to each of its operating divisions and to all of its sales personnel and shall instruct each sales person employed by it now or in the future to read this order and to be familiar with its provisions and to comply with it. The failure of such sales person to comply with this order shall be grounds for immediate dismissal.

VI

It is further ordered, That Salomon herein for a period of five (5) years from the date of this signing establish and maintain a file of all records referring or relating to Salomon's refusal to sell the Products to any dealer, which file shall contain a copy of any written communication to any such dealer explaining Salomon's refusal to sell, and which file will be made available for Commission inspection on reasonable notice.

VII

It is further ordered, That Salomon shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

EXHIBIT A

Letterhead of Salomon/North America, Inc.)

Dear Dealer:

Enclosed is a copy of a consent order which Salmon/North America, Inc. has signed with the Federal Trade Commission. The consent order concerns our pricing policies and distribution activities.

Salomon has entered into this agreement solely to settle a dispute with the Commission and to avoid the expense and delays of litigation. The agreement and enclosed consent order should not be considered as an admission that we have violated any of the laws administered by the Commission. Moreover, you should not assume that any of the allegations in the complaint are true or that any statements in the consent order reflect prior pricing or marketing practices of Salomon. Instead, the order merely reflects the terms of Salomon's agreement with the Federal Trade Commission and relates to Salomon's activities in the future.

It is important that you read and understand the terms of the enclosed consent order. There are, however, three essential points for you to remember:

(1) You are free to set your own retail or resale prices for Salomon products.

(2) We will not solicit, invite or encourage any dealer, or any other person to report any dealer not following any retail or resale price for any Salomon products. Furthermore, we will not act on any such reports sent to us.

(3) We will not require or induce any dealer to refrain from advertising Salomon products at any price or from offering or selling our products at any price to any person.

You must realize, however, that the consent order itself is controlling rather than our summary of its essential points. If you should have any questions, please call me or John O'Malley at 800-225-6818 (Northeast) or 800-225-6850 (Other).

Growth and Happiness,

Fred Schaeffer
President

Enc.

IN THE MATTER OF

IDEA RESEARCH AND DEVELOPMENT, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9032. Complaint, May 6, 1975 — Decision, Jan. 11, 1977

Consent order requiring a Mesquite, Tex., idea promotion firm, among other things, to cease misrepresenting the nature and value of its services; misrepresenting its ability to successfully promote ideas, inventions, or products; to its clients. Further, respondents are required to disclose, in contracts and promotional material, the lack of confidentiality afforded its clients' ideas, the ramifications of contracting with respondents prior to contacting an independent patent attorney, and the amount of monies earned by previous clients through respondents' endeavors. The order additionally requires a ten-day cooling-off period before the execution of contracts and prohibits respondents from accepting any fee other than a percentage of royalties resulting from its efforts.

Appearances

For the Commission: *Paul W. Turley, John J. Hemrick* and *Richard H. Gateley.*

For the respondents: *Melvyn Carson Bruder* and *Jack Kanz,* Dallas, Tex.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Idea Research and Development, Inc., a corporation, and Kellis Blakely Shanks and Jack Earnest Trout, individually and as officers of said corporation, and Walter Glenn Ford, individually and as an employee of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

I. DEFINITIONS

PARAGRAPH 1. For purposes of this complaint the following definitions shall apply:

A. "Idea" shall mean any idea, invention or product;

B. "Client" shall mean any party that has entered into an agreement with respondents for the "promotion" of an "idea;"

C. "Financial gain" shall mean an amount of money greater than the amount of money paid by a "client" to respondents.

D. "Promotion" shall mean the evaluation, development, manufacturing, marketing or otherwise contributing to the success or growth of an "idea."

II. RESPONDENTS

PAR. 2. Respondent Idea Research and Development, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 3318 Interstate 30 East, Mesquite, Texas.

Respondent Kellis Blakely Shanks is an individual and an officer of corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is 10347 Plummer, Dallas, Texas.

Respondent Jack Earnest Trout is an individual and an officer of corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is 9033 Thornton Freeway East, Mesquite, Texas.

Respondent Walter Glenn Ford is an individual and an employee of corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is 821 Vinecrest Lane, Richardson, Texas.

III. NATURE OF TRADE AND COMMERCE

PAR. 3. Respondents are now and have been engaged in the advertising, offering for sale and sale of contracts for future services in connection with the evaluation, development, manufacturing and marketing of ideas. The consideration required by respondents is and has been generally between $750.00 and $1,200.00.

IV. JURISDICTION

PAR. 4. In the course and conduct of their business as aforesaid, respondents now cause, and have caused, their advertising materials, contracts, and various business papers to be transmitted through the United States mail and other interstate instrumentalities from their place of business in the State of Texas to their places of business,

agents, representatives, employees, clients and prospective clients in various other States of the United States and the District of Columbia, and now maintain and operate and have maintained and operated, places of business and have made substantial sales of their agreements to clients in various States of the United States, and maintain and at all times mentioned herein have maintained, a substantial course of trade in or affecting commerce, as defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents are, and have been, in substantial competition, in commerce, with corporations, firms and individuals offering contracts for future services in connection with the evaluation, development, manufacturing and marketing of ideas.

V. ACTS AND PRACTICES

PAR. 6. In the further course and conduct of their aforesaid business, respondents now cause and have caused the dissemination of advertisements in various publications of general circulation, the broadcast of radio and television advertisements, the distribution of advertising materials to members of the public, and are now making and have made sales presentations by means of oral and written statements. By and through such means, respondents have made and are making representations that:

A. Respondents possess the ability to recognize ideas which may result in financial gains;

B. Respondents possess engineering and marketing expertise necessary for the development and promotion of ideas.

C. Respondents possess adequate knowledge to provide legal protection for clients' ideas.

D. Respondents have the ability to obtain manufacturing contracts for their clients;

E. Respondents have the ability to obtain financial gains for their clients, including but not limited to potential income to be derived by their clients from sales, licensing or royalty agreements.

PAR. 7. By and through the statements and representations alleged in Paragraph 6 herein, respondents have represented and are now representing, directly or by implication, that clients will have their ideas reviewed and evaluated by qualified and appropriately licensed persons; that clients receive legal protection for their ideas; that clients' ideas will be manufactured and marketed; and as a result of contracting with respondents, clients will receive a financial gain.

PAR. 8. In truth and in fact, few, if any, of respondents' clients have their ideas reviewed and evaluated by qualified and appropriately

licensed persons; receive legal protection for their ideas; have their ideas manufactured or marketed; or receive a financial gain as a result of contracting with respondents. Therefore, the acts and practices alleged in Paragraph 7 herein are deceptive, false, misleading and unfair.

PAR. 9. In the further course and conduct of their aforesaid business, respondents have failed to protect clients' investments and have failed to disclose facts concerning the probability that such clients will receive a financial gain as a result of contracting with respondents.

Since few, if any, of respondents' clients receive or have received financial gains as a result of contracting with respondents, respondents know or should have known that their clients' investments are unprotected and that their clients will not obtain financial gains.

Therefore, respondents, by inducing their clients to pay substantial sums of money without adequate protection for such clients' investments and without a disclosure of facts concerning the probability of a client receiving a financial gain which if known to certain prospective clients, would likely affect their decision of whether to execute contracts with respondents, are engaging in unfair acts or practices constituting a continuing violation of Section 5 of the Federal Trade Commission Act (15. U.S.C. 45).

PAR. 10. In the further course and conduct of their aforesaid business, respondents have represented, directly or indirectly, that their clients' ideas have adequate legal protection. Respondents have failed to disclose to their clients the degree of legal protection being afforded the clients' ideas and the risk involved in contracting with respondents concerning potential patent rights. Such disclosures include, but are not limited to:

A. Respondents fail to disclose that they afford no legal protection recognized by the United States Patent Office.

B. Respondents fail to disclose that the ordinary course of conduct of their business may be construed by the United States Patent Office to constitute publication of the clients' idea.

C. Respondents fail to disclose that publication of an unprotected idea for a period of one year or more may constitute a waiver of any patentable rights the client may have.

D. Respondents fail to disclose that their clients must maintain the confidentiality of their ideas.

Respondents' failure to disclose such consequences in language calculated to be readily understood by their clients is a failure to disclose material facts which if known to prospective clients would likely affect their decision of whether to execute contracts with

respondents. Respondents' aforesaid failure to disclose material facts is an unfair act or practice in violation of Section 5 of the Federal Trade Commission Act.

PAR. 11. Respondents as aforesaid have been and are now failing to disclose material facts while using other false, misleading, deceptive or unfair acts or practices, to induce persons to pay over to respondents substantial sums of money for contracts whose value to the said persons for services by respondents was and is virtually worthless. Respondents have received the said sums and have failed to offer to refund and refuse to refund such money to such persons.

The use by respondents of the aforesaid practices and their continued retention of the said sums, as aforesaid, is an unfair act or practice and a continuing violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

PAR. 12. The use by respondents of the aforementioned unfair, false, misleading and deceptive acts, practices, statements or representations has had and now has, a capacity and tendency to mislead and deceive a substantial portion of the purchasing public into erroneous and mistaken beliefs and into the execution of contracts with respondents by reason of said erroneous and mistaken beliefs.

PAR. 13. The aforementioned acts and practices, as herein alleged, have caused and are now causing substantial pecuniary losses to persons contracting with respondents and are all to the prejudice and injury of the public and respondents' competitors and have constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its complaint on May 6, 1975, charging respondents named in the caption hereof with violation of the Federal Trade Commission Act, and respondents having been served with a copy of that complaint; and

The Commission having withdrawn the matter from adjudication pursuant to Section 3.25 of the Commission's Rules of Practice for the purpose of negotiating a settlement by entry of a consent order; and

Respondents and counsel for the complaint having thereafter executed an agreement containing a consent order, an admission by respondents of all jurisdictional facts set forth in the complaint, and waivers and an understanding that the agreement does not affect the Commission's right to seek consumer redress and provisions as required by the Commission's Rules; and

The Commission having thereafter considered the aforesaid agree-

ment and having determined that it provides an adequate basis for appropriate disposition of this proceeding, and having accepted said agreement, and the agreement containing consent order having placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 3.25(d) of its Rules, now, in further conformity with the procedure prescribed in its Rules, the following findings, are made, and the following order is entered:

Respondents have waived, without admitting, any rights to contest in the administrative proceeding the findings of fact and conclusions of law made herein. It is expressly provided that said findings shall not be conclusive in any action which may be brought under Section 19(a)(2) of the Federal Trade Commission Act, as amended (15 U.S.C. 57b(a)(2)).

FINDINGS OF FACT

1. Respondent Idea Research and Development, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 3318 Interstate 30 East, Mesquite, Texas.

2. Respondent Kellis Blakely Shanks is an individual and an officer of corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is P. O. Box 28502, Dallas, Texas.

3. Respondent Jack Earnest Trout is an individual and an officer of corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is 1427 Lancelot, Borger, Texas.

4. Respondent Walter Glenn Ford is an individual and is a former employee of corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is 2202 Delwin Circle, Killeen, Texas.

5. Respondents are now and have been engaged in the advertising, offering for sale and sale of contracts for future services in connection with the evaluation, development, manufacturing and marketing of ideas. The consideration required by respondents is and has been generally between $750 and $1,200.

6. In the course and conduct of their business as aforesaid, respondents now cause, and have caused, their advertising materials, contracts, and various business papers to be transmitted through the

United States mail and other interstate instrumentalities from their place of business in the State of Texas to their places of business, agents, representatives, employees, clients and prospective clients in various other States of the United States and the District of Columbia, and now maintain and operate and have maintained and operated, places of business and have made substantial sales of their agreements to clients in various States of the United States, and maintain and at all times mentioned herein have maintained, a substantial course of trade in or affecting commerce, as defined in the Federal Trade Commission Act.

7. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents are, and have been, in substantial competition, in commerce, with corporations, firms and individuals offering contracts for future services in connection with the evaluation, development, manufacturing and marketing of ideas.

8. In the further course and conduct of their aforesaid business, respondents now cause and have caused the dissemination of advertisements in various publications of general circulation, the broadcast of radio and television advertisements, the distribution of advertising materials to members of the public, and are now making and have made sales presentations by means of oral and written statements. By and through such means, respondents have made and are making representations that:

A. Respondents possess the ability to recognize ideas which may result in financial gains;

B. Respondents possess engineering and marketing expertise necessary for the development and promotion of ideas;

C. Respondents possess adequate knowledge to provide legal protection for clients' ideas;

D. Respondents have the ability to obtain manufacturing contracts for their clients;

E. Respondents have the ability to obtain financial gains for their clients, including but not limited to potential income to be derived by their clients from sales, licensing or royalty agreements.

9. By and through the statements and representations alleged in Paragraph 8 herein, respondents have represented and are now representing, directly or by implication, that clients will have their ideas reviewed and evaluated by qualified and appropriately licensed persons; that clients receive legal protection for their ideas; that clients' ideas will be manufactured and marketed; and as a result of contracting with respondents, clients will receive a financial gain.

10. In truth and in fact, few, if any, of respondents' clients have their ideas reviewed and evaluated by qualified and appropriately

licensed persons; receive legal protection for their ideas; have their ideas manufactured or marketed; or receive a financial gain as a result of contracting with respondents.

11. In the further course and conduct of their aforesaid business, respondents have failed to protect clients' investments and have failed to disclose facts concerning the probability that such clients will receive a financial gain as a result of contracting with respondents.

12. Since few, if any, of respondents' clients receive or have received financial gains as a result of contracting with respondents, respondents know or should have known that their clients' investments are unprotected and that their clients will not obtain financial gains.

13. In the further course and conduct of their aforesaid business, respondents have represented, directly or indirectly, that their clients' ideas have adequate legal protection. Respondents have failed to disclose to their clients the degree of legal protection being afforded the clients' ideas and the risk involved in contracting with respondents concerning potential patent rights. Such disclosures include, but are not limited to:

A. Respondents fail to disclose that they provided no greater protection than that provided by compliance with the document disclosure program of the United States Patent Office.

B. Respondents fail to disclose that the ordinary course of conduct of their business may be construed by the United States Patent Office to constitute publication of the clients' idea.

C. Respondents fail to disclose that publication of an unprotected idea for a period of one year or more may constitute a waiver of any patentable rights the client may have.

D. Respondents fail to disclose that their clients must maintain the confidentiality of their ideas.

14. Respondents' failure to disclose such consequences in language calculated to be readily understood by their clients is a failure to disclose material facts which if known to prospective clients would likely affect their decision of whether to execute contracts with respondents.

15. Respondents as aforesaid have been and are now failing to disclose material facts while using other false, misleading, deceptive or unfair acts or practices, to induce persons to pay over to respondents substantial sums of money for contracts whose value to the said persons for services by respondents was and is virtually worthless. Respondents have received the said sums and have failed to offer to refund and refuse to refund such money to such persons.

16. The use by respondents of the aforementioned unfair, false, misleading and deceptive acts, practices, statements or representations has had and now has, capacity and tendency to mislead and deceive a substantial portion of the purchasing public into erroneous and mistaken beliefs and into the execution of contracts with respondents by reason of said erroneous and mistaken beliefs.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents, and the proceeding is in the public interest.

2. The aforementioned acts and practices have caused and are now causing substantial pecuniary losses to persons contracting with respondents and are all to the prejudice and injury, of the public and respondents' competitors and have constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER

I

Definitions

For purposes of this order the following definitions shall apply:

A. "Idea" shall mean any idea, invention or product;

B. "Client" shall mean any party that has entered into an agreement with respondents for the "promotion" of an "idea;"

C. "Financial gain" shall mean an amount of money derived by a "client," from a respondent's "promotion" of the client's "idea."

D. "Promotion" shall mean the evaluation, development, manufacturing, marketing or otherwise contributing to the success or growth of an "idea."

E. "Future services," shall include any arrangement whereby one party pays or contracts to pay a sum of money in the belief that he may receive, as a result of such arrangement, the delivery or performance, at least partly in the future, of any service, benefit, promotion, sum of money, or similar thing of value; the term shall include, but shall not be limited to, any arrangement whereby one party pays or contracts to pay a sum of money in the belief that he may receive a financial gain as a result of such arrangement.

II

It is ordered, That respondents, Idea Research and Development, Inc., a corporation, and its officers, and Kellis Blakely Shanks and Jack Earnest Trout, individually and as officers of said corporation and Walter Glenn Ford, individually and as a former employee of said corporation, their successors and assigns, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale or sale of contracts for future services in the promotion of ideas, or any other future services, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or indirectly, by any means, that:

A. Respondents possess ability in the field of engineering unless they retain a licensed engineer who shall provide a written evaluation of each client's idea. Respondents shall provide a copy of said evaluation which the client may retain.

B. A client may or can obtain legal protection for his idea unless respondents retain an attorney or agent licensed by the United States Patent Office who renders a written opinion on such client's idea. Respondents shall provide a copy of said opinion which the client may retain.

C. Any party may or will receive a financial gain as a result of contracting with respondents except as allowed by Subparagraphs A and B of Paragraph 4 of this order.

2. Representing, directly or indirectly, by any means, that respondents possess the ability to promote ideas that will or may result in financial gains for their clients.

3. Failing to prominently display the following notice in two or more locations in those portions of respondents' business premises most frequented by prospective clients and in each location where clients sign contracts or other binding instruments. Such notice shall be considered prominently displayed only if so positioned as to be easily observed and read by respondents' clients and prospective clients:

NOTICE

BY PROCEEDING WITHOUT THE ADVICE OF AN INDEPENDENT PATENT ATTORNEY, YOU MAY LOSE ANY RIGHTS YOU MIGHT HAVE IN YOUR IDEA, INVENTION OR PRODUCT OR EXPOSE YOURSELF TO A COSTLY PATENT INFRINGEMENT LAWSUIT. THEREFORE, PRIOR TO SIGNING ANY AGREEMENT WITH US YOU SHOULD AND ARE ENCOURAGED TO CONSULT AN INDEPENDENT PATENT ATTORNEY.

4. Failing to make the following disclosures on the contract or other binding instrument to be executed by prospective clients. Said disclosures shall be in more conspicuous print than all other language in said instrument, but in no case shall they be smaller than 12 point upper case type. Said disclosures and instrument shall be delivered to prospective clients at least 10 days prior to the time prospective clients execute said instrument. The disclosures shall be in the following form set off from the text of the instrument by a black border and immediately above the line for the prospective clients' signatures:

NOTICE

(A) SINCE WE BEGAN DOING BUISNESS, WE HAVE CONTRACTED TO PROMOTE IDEAS, INVENTIONS, OR PRODUCTS FOR (*Number*) CLIENTS. SINCE JULY 1, 1975, WE HAVE CONTRACTED WITH (*Number*) CLIENTS. AS A RESULT OF OUR SERVICES:

1. (*Number*) OF OUR CLIENTS EARNED NOTHING.
2. (*Number*) OF OUR CLIENTS EARNED $100-$499.
3. (*Number*) OF OUR CLIENTS EARNED $500-$1000.
4. (*Number*) OF OUR CLIENTS EARNED OVER $1000.

(B) WITHOUT PATENT PROTECTION RECOGNIZED BY THE UNITED STATES PATENT OFFICE, YOU MAY LOSE THE OPPORTUNITY TO OBTAIN FINANCIAL BENEFIT FROM YOUR IDEA. WE DO NOT PROVIDE ANY LEGAL PROTECTION RECOGNIZED BY THE UNITED STATES PATENT OFFICE.

(C) BECAUSE THERE WILL BE NO PATENT PROTECTION FOR YOUR IDEA, SERIOUS CONSEQUENCES COULD RESULT FROM YOUR CONTRACTING WITH US, INCLUDING:

(1) When we disclose information concerning your idea to persons/manufacturers/marketers outside our company, such disclosure may be interpreted by the United States Patent Office as a "publication" of your idea.

(2) "Publication" for a period of one year or more of an idea which has no legal protection recognized by the United States Patent Office will result in the loss of any patentable rights you may have.

(D) YOU SHOULD TREAT YOUR IDEA AS A CONFIDENTIAL SUBJECT IN ORDER TO AVOID LOSING ANY PATENT RIGHTS YOU MAY HAVE.

(E) BY PROCEEDING WITHOUT THE ADVICE OF AN INDEPENDENT PATENT ATTORNEY YOU MAY LOSE ANY RIGHTS YOU MIGHT HAVE IN YOUR IDEA, INVENTION OR PRODUCT OR EXPOSE YOURSELF TO A COSTLY PATENT INFRINGEMENT LAWSUIT. YOU SHOULD AND ARE ENCOURAGED TO CONSULT AN INDEPENDENT PATENT ATTORNEY BEFORE YOU SIGN THIS AGREEMENT.

(F) TODAY IS (*Date*) WE CANNOT ASK YOU TO SIGN AN AGREEMENT UNTIL 10 BUSINESS DAYS HAVE ELAPSED WHICH WILL BE ON (*Month/Day/Year*).

I, (*Name of Customer*), hereby acknowledge receipt of a copy of this agreement on the date specified below.

Customer's Signature Date

5. Executing contracts or other agreements with a client prior to expiration of the 10-day period disclosed in accordance with Paragraph 4 herein.

6. Failing to retain executed copies of all disclosures required by Paragraph 4 of this order for a period of three (3) years after such disclosure is made regardless of whether prospective clients ultimately execute contracts. Respondents shall make accurate statistical disclosures required by this paragraph and maintain records for a period of five (5) years sufficient to verify the accuracy of each disclosure. Accurate disclosures, given without comment, as required by Paragraph 4 of this order, shall not be deemed a violation of Paragraph 1 of this order.

7. Failing, in all pamphlets, brochures and other promotional materials to make the following disclosures in the manner and form provided for herein.

A. In all printed advertisements, the notice shall be conspicuously placed in print at least as large as the largest print in the advertising material other than respondent's name and shall state:

> (*Number*) % of our clients have earned at least $100 as a result of our efforts to promote their ideas.

B. In all advertisements broadcast by radio, or television, the above-required notice shall be read at the end of the advertisement at a rate of speed at least as slow as the slowest part of the advertisement.

C. At the time respondents submit advertising to any newspaper or other written medium, they shall provide a copy of the following notice to each such medium:

NOTICE

> (*Name of Respondent*) has entered into a Consent Agreement with the Federal Trade Commission. A copy of the Commission's News Release is available from (*Name of Respondent*) upon request.

D. At the time respondents submit advertising to any radio or television station, they shall provide a copy of the following notice to each such station:

NOTICE

(*Name of Respondent*) has entered into a Consent Agreement with the Federal

Trade Commission. A copy of the news release is available on request. Your attention is directed to an agreement between the Federal Trade Commission and the Federal Communications Commission dated April 27, 1972.

8. Failing to maintain for a period of three (3) years after any of their advertisements are disseminated:

(A) records disclosing the date or dates each such advertisement was published;

(B) records disclosing the name and address of the newspapers, other publications or broadcast media disseminating said advertisement; and

(C) copies or scripts of all of their advertisements published or disseminated by any media.

9. Failing to utilize one written contract or other binding instrument which shall constitute the entire agreement between the parties. In addition to the disclosures required under Paragraph 4 herein each such instrument shall contain the following provision:

(*Name of Respondent*) agrees to present to the client all materials due to the client pertaining to the promotion of said client's idea within 90 days of the date this agreement is executed, and it is hereby further agreed that time is of the essence. If such materials are not presented to the client within the 90 day period it is hereby mutually agreed between (*Name of Respondent*) and the client whose signature appears below that this agreement is rescinded in its entirety.

10. *It is further ordered,* That respondents cease and desist from:

A. Including in any contract or other document any waiver, limitation or condition on the right of a client to rescind an agreement under any provision of this order.

B. Misrepresenting the right of a client to rescind an agreement under any provision of this order or any applicable statute or regulation.

C. Making any representations or taking any action which is inconsistent with or detracts from the effectiveness of this order.

11. *It is further ordered,* That respondents shall make all disclosures required by this order accurately, making such disclosures or copies thereof available to the Federal Trade Commission on request, and comply with all contract provisions required by this order.

12. *It is further ordered,* That neither the corporate respondent nor the individual respondents engage in any course of conduct which contravenes the rights of clients or prospective clients provided by this order.

13. *It is further ordered,* That respondents, upon receipt of a complaint from a client alleging facts that indicate this order may have been violated, rescind the contract where respondents determine, after a good faith investigation, that one or more of the

paragraphs of this order may have been violated in connection with such client's transaction with respondents.

14. *It is further ordered:*

A. That respondents deliver, by hand or by certified mail, a copy of this order to each of their present or future salesmen, independent brokers, employees or any other person who sells or promotes the sale of respondents' contracts;

B. That respondents provide each person so described in sub-paragraph A above with a form returnable to respondents, clearly stating an intention to conform sales practices to the requirements of this order and retain such form for a period of three (3) years after it is executed by said persons;

C. That respondents inform each person described in sub-paragraph A above that respondents shall not use any such person, or the services of any such person, until such person agrees to and files notice with respondents to be bound by the provisions contained in this order;

D. That in the event such person will not agree to file such notice with respondents and be bound by the provisions of this order, respondents shall not use such person, or the services of such person;

E. That respondents institute a program of continuing surveillance adequate to reveal whether the sales practices of each of said persons described in sub-paragraph A conform to the requirements of this order; and

F. That respondents discontinue dealing with any person described in sub-paragraph A of this order who engages in the acts or practices prohibited by this order.

15. *It is further ordered,* That any respondent may accept compensation from a client for the promotion of the client's idea only as a percentage of royalties or other financial gain derived through a respondent's efforts. A respondent may not accept any other fee or monetary consideration from a client.

16. *It is further ordered,* That no respondent sell, lease, exchange or otherwise alienate a client's idea or disclose a client's name, address, telephone number or other personal data to any party which will or may request such client to pay a fee or other monetary consideration for the promotion of that client's idea.

17. *It is further ordered,* That in the event the Federal Trade Commission promulgates a Trade Regulation Rule applicable to respondents' business that this order shall be deemed modified to the extent it contravenes said Rule.

18. *It is further ordered,* That in the event that corporate respondent merges with another corporation or transfers all or a

substantial part of its business, respondents shall require said successor or transferee to file within thirty (30) days with the Commission a written agreement to be bound by the terms of this order; provided that if respondents wish to present to the Commission any reason why said order should not apply in its present form to said successor or transferee, they shall submit to the Commission a written statement setting forth said reasons prior to the succession or transfer.

19. *It is further ordered,* That the individual respondents named herein promptly notify the Commission of the discontinuance of their employment with Idea Research & Development, Inc., and of their affiliation with a new business or employment. In addition, the individual respondents named herein shall promptly notify the Commission of their affiliation with a new business or employment whose principal activities include the advertising, offering for sale or sale of contracts for future services and their affiliation with a new business or employment in which their own duties and responsibilities involve the advertising, offering for sale or sale of contracts for future services in the promotion of ideas, or any other future services. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

20. *It is further ordered,* That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

21. *It is further ordered,* That each respondent shall, within sixty (60) days after service of this order upon it, file with the Commission a report in writing setting forth in detail the manner and form of its compliance with the order to cease and desist.

IN THE MATTER OF

KRAFTCO CORPORATION, ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket 9035. Complaint, June 17, 1975 — Order, Jan. 11, 1977*

Order requiring SCM Corporation, a New York City producer of margarine, edible oils and barbecue sauce, among other things, to cease seating on its board of directors, individuals who simultaneously serve as directors of Kraftco Corporation, or any other companies with whom respondent is in competition.

Appearances

For the Commission: *Ronald A. Bloch, Clinton R. Batterton* and *Joseph Tasker, Jr.*

For the respondents: *William E. Willis* and *Marcia B. Paul, Sullivan & Cromwell,* New York City.

INITIAL DECISION BY MORTON NEEDELMAN, ADMINISTRATIVE LAW JUDGE

JUNE 17, 1976

I

[1] STATEMENT OF THE CASE

The Commission's complaint in this proceeding issued on June 17, 1975. It charges Kraftco Corporation[1] (hereinafter "Kraftco"), SCM Corporation (hereinafter "SCM"), and an individual, Richard C. Bond (hereinafter "Bond") with violating Section 8 of the Clayton Act (15 U.S.C. 19),[2] and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45)[3] by reason of an unlawful interlocking directorate. According to the complaint, Bond served simultaneously on the Boards of Directors of Kraftco and SCM which compete in the sale of margarine, edible oils, and barbecue sauce. The complaint further

* Complaint in Docket 9035 and consent order as to individual respondent, Richard C. Bond, appear at 87 F.T.C. 809; consent order as to corporate respondent, Kraftco Corporation, appears at 88 F.T.C. 362.

[1] Incorrectly captioned "Kraftco, Inc." in the complaint. See Answer of Kraftco Corporation, ¶ 2.

[2] Section 8 provides as follows with respect to interlocking directorates:

> * * * [N]o person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination, of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

[3] Section 5 of the Federal Trade Commission Act prohibits unfair methods of competition and unfair and deceptive acts or practices.

alleges that each corporate respondent has capital, surplus, and undivided profits aggregating more than one million dollars.

Kraftco and Bond have entered into consent settlements.[4] The remaining issue in this case is the liability of SCM.

[2]SCM's answer, dated November 17, 1975, admits certain complaint allegations respecting corporate identity. The answer also admits that SCM's capital, surplus, and individual profit aggregate more than one million dollars and that it is engaged in commerce, as "commerce" is defined in both the Clayton Act and the Federal Trade Commission Act. SCM's answer denies that Bond was a member of its Board of Directors at the time the answer was filed, but admits that prior to August 1, 1975, he was on SCM's Board. SCM's answer also admits the sale of certain food products, but denies knowledge sufficient to form a belief as to the allegations of the complaint respecting competition between it and Kraftco. SCM's answer then asserts several affirmative defenses, to wit: 1) the complaint fails to state a claim upon which relief could be granted, 2) Bond's resignation from SCM's Board renders the case moot, 3) competition, if any, between Kraftco and SCM is *de minimis* and not within the statutory purpose of the anti-interlock law, 4) the Commission lacks jurisdiction over SCM because Section 8 applies only to individuals and not to the corporations themselves, and 5) respondent's due process and equal protection rights have been violated by the Commission's uneven and discriminatory enforcement of Section 8. Concurrently with the filing of its answer, SCM moved for summary decision on the same grounds as those asserted as affirmative defenses. On December 1, 1975, complaint counsel filed a cross-motion for summary decision.[5]

A prehearing conference was held on December 19, 1975. After hearing oral argument on cross-motions for summary judgment, the administrative law judge suggested that the basic facts of the case should be stipulated and a decision could then be rendered on the basis of the stipulation. The parties agreed to follow this course of action, and on April 29, 1976, a factual stipulation was filed. On May 10, 1976, proposed findings and supporting briefs were filed by both parties, and replies were filed on June 3, 1976.

[3] On the basis of the factual stipulation, uncontroverted affidav-

[4] The Commission accepted a consent settlement from Bond on April 26, 1976. Kraftco's consent agreement was provisionally accepted by the Commission and placed on the public record for 60 days comment on May 6, 1976.

[5] Complaint counsel renewed this motion in its Supplementary Memorandum of Law in Support of Complaint Counsel's Motion for Summary Decision and in Opposition to SCM's Motion To Dismiss (May 10, 1976). In view of my disposition of this matter on the merits by relying on a stipulated record, I need not address the summary decision question.

its submitted with the cross-motions for summary decision, and the pleadings, I make the following findings of fact:[6]

II

FINDINGS OF FACT

1. SCM is a New York corporation with its principal office and place of business located at 299 Park Ave., New York, New York. (SCM Ans., ¶ 2.)

2. SCM is a diversified industrial company which manufactures and distributes various products, including typewriters, business equipment, home appliances, paints, resins, food, chemicals, and paper. In fiscal 1975, SCM had total sales of $1,287,000,000. (Stip., § 1; Sexton, Aff. 1, ¶ 4.)

3. SCM has capital, surplus, and undivided profits aggregating more than one million dollars. (SCM Ans., ¶2.)

[4] 4. SCM is engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act. (SCM Ans., ¶ 2.)

5. SCM's business includes the manufacture and sale in commerce of margarine, edible oils, and barbecue sauce. (SCM Ans., ¶ 5; Stip. ¶'s 2, 3, 4.)

6. Kraftco, a corporation engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act, has capital, surplus, and undivided profits aggregating more than one million dollars. (Kraftco Ans., ¶ 2) Total Kraftco sales in 1974 were approximately $4,500,000,000. (Sexton Aff. 1, ¶ 4.)

7. SCM competes with Kraftco in the sale of margarine, edible oils, and barbecue sauce. Sales by SCM in fiscal 1975 of products sold in competition with Kraftco products were approximately $83 million.[7] During the same period, Kraftco had sales of products in competition

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[6] The following abbreviations are used throughout this initial decision:
"Stip." - Stipulation of April 29, 1976, with ¶ references.
"SCM Ans." - SCM's Answer to Complaint, with ¶ references.
"Kraftco Ans." - Kraftco's Answer to Complaint, with ¶ references.
"Sexton Aff. 1" - Affidavit of Richard Sexton, Vice President and General Counsel of SCM, dated November 11, 1975 and filed with SCM's Motion for Summary Decision Dismissing the Complaint, with ¶ references.
"Sexton Aff. 2" - Affidavit of Richard Sexton, Vice President and General Counsel of SCM, dated December 12, 1975 and filed with SCM's Memorandum of Law in Opposition to Motion by Counsel Supporting the Complaint and in Further Support of Motion by Respondent SCM, with ¶ references.

[7] SCM's *total* sales of these products in 1975 were approximately $123,552,000, broken down as follows:
$ 643,500 - Sales of margarine to industrial bakers
386,100 - Sales of margarine to wholesalers
25,740,000 - Sales of edible oil to industrial manufacturers of fried snacks
25,740,000 - Sales of edible oil to industrial manufacturers of prepared mixes and industrial bakeries
64,350,000 - Sales of edible oil to food service industry
6,435,000 - Sales of barbecue sauce to retail grocery trade
257,400 - Sales of barbecue sauce to food service industry. (Stip., ¶'s 2, 3, 4.)

with SCM of approximately $258 million. (Stip., ¶ 1.) Specifically, SCM and Kraftco competed as follows in 1975:

(a) SCM sold margarine in 41 states in competition with Kraftco. (Stip., ¶ 2.)
(b) SCM sold edible oils in competition with Kraftco in all states. (Stip., ¶ 3.)
[5] (c) SCM competed with Kraftco west of the Mississippi River in the sale of barbecue sauce. (Stip., ¶ 4.)
(d) SCM and Kraftco have placed advertisements for edible oils, margarine, and barbecue sauce in the same trade publications. (Stip., ¶ 5.)

8. Bond became a member of SCM's Board of Directors in 1967 and continued as a director until he submitted his resignation on August 1, 1975. (Sexton Aff. 1, ¶ 6.) This resignation was accepted by SCM at the August 21, 1975 meeting of the SCM Board of Directors. (Sexton Aff. 2, ¶ 3.) Bond joined the Board of Directors of Kraftco sometime in 1957, and he continues to this day to serve on the Kraftco Board. (Sexton Aff. 1, ¶ 6.) SCM does not intend to reappoint Bond to its Board of Directors so long as he is a director of Kraftco or any corporation which competes or might compete in any line of commerce with SCM. (Sexton Aff. 1, ¶ 10.)

III

DISCUSSION[8]

On the basis of the factual stipulation submitted by the parties, there is no question that (1) Bond served simultaneously on the Board of Directors of both SCM and Kraftco;[9] (2) both corporations are engaged in "commerce" and have capital, surplus, and undivided profits aggregating more than $1,000,000;[10] and [6] (3) the two corporations compete.[11] Respondent SCM, however, contends that there are several defenses to what appears to be an obvious violation of Section 8.

First, respondent says that the Commission lacks jurisdiction over SCM because the prohibitions of Section 8 of the Clayton Act are directed exclusively to individuals. According to respondent, there is nothing in Section 8 which says it is illegal for corporations to have

[8] References in this section are to the briefs and reply briefs as follows:
"SCM Main Brief" - Memorandum of Law of Respondent SCM Corporation (May 10, 1976).
"SCM Reply Brief" - Reply Memorandum of Law of Respondent SCM Corporation (June 3, 1976).
[9] Finding 8.
[10] Findings 3, 4, and 6.
[11] Finding 7.

interlocking directors; the statute, respondent asserts, is directly solely to individuals serving on two interlocking corporations. SCM Main Brief, pp. 16-23; SCM Reply Brief, p. 8.

While corporations have been held liable in Section 8 proceedings, See, *e.g., United States* v. *Sears, Roebuck and Co.,* 111 F. Supp. 614 (S.D.N.Y. 1953), it is true that in the only Supreme Court decision on the anti-interlock provisions of the Clayton Act, the Supreme Court specifically reserved judgment on the question of corporate liability.[12] Notwithstanding the lack of a definitive Supreme Court holding or the absence of legislative history directly in point, I believe that the language of Section 11(b) of the Clayton Act disposes of respondent's argument. This section says that the Commission shall issue orders requiring a "person" (defined in Section 1 of the Clayton Act as including corporations) to cease and desist from violations of the Act, including Section 8, and to "rid itself of the directors chosen contrary to the provisions of * * * section 8." Since the only "person" that could logically "rid itself" of directors is a corporation, by its terms, the statute gives the Commission jurisdiction over corporations.[13] [7] Despite the clear language of Section 11 respecting the powers of the Commission, respondent argues that this section is merely "procedural" and that only Section 8 "defines" the offense. SCM Main Brief, p. 20. Such a bifurcated reading of this legislation, which would effectively eliminate most of Section 11, conflicts with the accepted principles of construction that separate parts of a single statute should be harmonized and construed together (See *Clark* v. *Uebersee Finanz-Korp.,* 332 U.S. 480, 488 (1947)) and that no parts of a statute are to be denied significance and effect. *Ex Parte Public Bank,* 278 U.S. 101, 104 (1928).

As for respondent's argument that the subject language in Section 11 is a "vestigial" carry-over from the pre-1935 version of Section 8 which expressly prohibited banks from having interlocking directorates (SCM Main Brief, p. 21), not only is this a strained interpretation of inapposite legislative history, but also a strong argument could be made that the 1935 amendments, which were intended to strengthen rather than weaken Section 8 by removing the discretion of the Governors of the Federal Reserve System to allow interlocks (See, STAFF OF ANTITRUST SUBCOMM. OF HOUSE COMM. ON THE JUDICIARY, 89th Cong., 1st Sess., Report on Interlocks in Corporate Management

[12] *United States* v. *W. T. Grant Co.,* 345 U.S. 629 at 634, n. 9 (1953).

[13] The section reads, in pertinent part, as follows:

"If * * * the Commission * * * shall be of the opinion that any of the provisions of said sections [including Section 8] have been or are being violated, *it shall * * * issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act,* if any there be, in the manner and within the time fixed by said order." 15 U.S.C. 21 [Emphasis added.]

23-24 (Comm. Print 1965)), left intact the power of the Federal Reserve System, as indicated in Section 11, to continue to prohibit banks from having interlocks. In any event, whatever the reach of the Federal Reserve System after the 1935 amendments may or may not be over banks, there is no legislative history cited by respondent which can be even remotely interpreted as saying that one should ignore what Congress expressly said in Section 11 about the jurisdiction of the Federal Trade Commission to enforce Section 8 against corporations.

Moreover, going beyond its plain language, Section 11 cannot be interpreted in such a way as to frustrate the very purpose and objective of Section 8.[14] But this is precisely what would happen if corporations, as respondent urges, could not be held accountable for Section 8 violations. Congress intended by Section 8 [8] "to nip in the bud incipient violations of the anti-trust laws by removing the opportunity or temptation to such violations through interlocking directorates." *United States* v. *Sears, Roebuck and Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953). An interpretation of Sections 8 and 11 which allows corporations to seat interlocking directorates, reap the anticompetitive benefits, and then possibly appoint new interlocking directors after each violation is uncovered would transform a statute aimed at preventing full-blown antitrust violations into a license giving corporations multiple opportunities for achieving actual anti-competitive results.

Respondent further contends that even if Section 11 does give the Commission jurisdiction over a corporation, the same section limits relief to an order requiring the corporation to rid itself of the director chosen contrary to the provisions of Section 8 of the Act. SCM Main Brief, p. 20. Respondent then argues that since no unlawful interlocking directorate now exists (Bond resigned from the SCM Board after complaint issued), Section 11 cannot be invoked as the basis for a cease and desist order. This contention also totally ignores the clear language of Section 11 which not only allows the Commission to require a corporation to rid itself of the offending directors, but also authorizes the Commission to issue "an order requiring such person [including a corporation] to cease and desist from such violations." Thus, Section 11 relief is *not* limited to orders simply requiring removal of the director who was a participant in the unlawful interlock, and even if the director *has* been removed, an appropriate order to cease and desist may be entered. In addition, it has been held

[14] A statute should be construed by looking to its object and underlying policy. As the Supreme Court recently said, "Our objective * * * is to ascertain the Congressional intent and give effect to the legislative will." *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975).

that Commission's remedial powers under Section 11 to issue a cease and desist order governing future conduct are as broad as its general equitable powers under Section 5 of the Federal Trade Commission Act, and "the question to be asked in fashioning a remedy should be: What kind of order, within the broad range of an equity court's remedial powers, would, in the particular circumstances, be most effective to 'cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.' " *Ecko Products Co.*, 65 F.T.C. 1163, [9] 1215 (1964), *aff'd.*, 347 F.2d 745 (7th Cir. 1965).[15]

Next, respondent argues that issuance of an order in this case is not required because the "nature and magnitude of the competition, such as it is, between SCM and Kraftco, is not 'actual and substantial' as that term has been repeatedly used in the antitrust laws" and that an interlock between SCM and Kraftco, "in no material manner adversely affects [the] public interest." SCM Main Brief, pp. 35-36; SCM Reply Brief, p. 5. This argument misconceives the purpose of Section 8 while at the same time ignoring the stipulated facts.

Given the fact that the parties have stipulated to a competitive overlap between Kraftco and SCM in the sale of margarine, edible oils, and barbecue sauce, the issue of competition has been removed from the case. The statute is violated whenever the technical requirements of "commerce" and jurisdictional amount are met, and the companies are in a competitive relationship where there is a *potential* for an agreement between them which would violate *any* of the antitrust laws, for example, a division of territory or a price-fix relating to the sale of edible oil. There is no need under this statute to have an elaborate market analysis, and evidence of actual effects on competition is unnecessary. *Protectoseal Company* v. *Barancik*, 484 F.2d 585 (7th Cir. 1973); *United States* v. *Sears, Roebuck and Co.*, 111 F. Supp. 614 (S.D.N.Y. 1953).

[10] On the question of the substantiality of the competitive overlap, the court noted in *Sears, Roebuck* that Congress had provided Section 8 with "its own substantiality standard in the form of the one million dollar size requirement."[16] But even assuming that

[15] While *Ecko* dealt specifically with the question of the power of the Commission to ban future acquisitions under Section 11 after a Section 7 violation has been proven, the decision touched generally on the similarity between a Section 11 cease and desist order (including orders aimed at interlocks) and the remedial scope of Section 5 (See 65 F.T.C. 1215, footnote 9). The decision indicates that *both* statutes are now to be read broadly, not only because of the 1950 amendments to the merger law, but also for the reason that *FTC* v. *Eastman Kodak Co.*, 274 U.S. 619 (1927), which limited the scope of cease and desist orders, has for all practical purposes been overruled by *Pan American World Airways* v. *United States*, 371 U.S. 296, 312 and notes 17, 18 (1963).

[16] 111 F. Supp. at 619.

there may be some minimum amount of competitive overlap below which no violation should be found,[17] the issue simply does not arise in this case. SCM and Kraftco do not come within any conceivable application of a *de minimis* rule, even if one were applicable here, since the competitive overlap between respondent and Kraftco was approximately $340 million in 1975. SCM's share of those sales, $83 million, is substantial by any measure.[18]

[11] Respondent next argues that its constitutional rights to due process and equal protection of the laws have been violated by the Commission's departure from an established procedure generally taken with regard to Section 8. Respondent says that the Commission's prior practice has been to seek voluntary termination of interlocking directorates and then to dismiss the action after resignation of the challenged director. According to respondent, the Commission's failure to follow this procedure here is arbitrary and discriminatory. SCM Main Brief, pp. 23-34; SCM Reply Brief, pp. 8-9. This argument, too, is without merit.

The facts of the matter are that the Commission has used various methods in enforcing Section 8. It is true that between 1960 and 1966, the Commission closed eleven Section 8 investigations after termination of the offending interlocks, and that in none of the pre-1966 cases was a formal consent order executed.[19] But apparently this policy did not accomplish what Congress set out to do. As a result, in all formal complaint proceedings initiated since 1972, *corporate* respondents have routinely been required to enter into consent agreements even though the interlocks have been terminated.[20] Clearly, the Commission has the right, even the duty, to change procedures if it finds that informal settlements are not producing an adequate level of compliance. In any event, respondent's bald assertion that the Commission's practice is to dismiss actions after termination of the interlocks is in

[17] A strong argument can be made that there is no *de minimis* defense in a Section 8 case because the statute prohibits interlocks where the competitive relationship is such that elimination of competition by agreement would violate *any* of the provisions of *any* of the antitrust laws. Such an agreement would include price-fixing which is illegal regardless of the amount involved. Kramer, *Interlocking Directorships and the Clayton Act After 35 Years*, 59 Yale L.J. 1266 at 1269 (1950). But see *Paramount Pictures Corp.* v. *Baldwin-Montrose Chemical Co.*, 1966 Trade Cases, ¶ 71,678 (S.D.N.Y. 1966) which speaks of "*de minimis* competition" in the context of a Section 8 case where the competitive overlap was not only small, but also would not readily lend itself to a possible price-fix or a market allocation.

[18] As the court said in *Sears, Roebuck* "Surely, the sales of $80,000,000 do not come within the de minimis principle," 111 F. Supp. 614 at 621, and "The fact that this volume of sales may represent but a small percentage of either or both of the corporate defendants' annual sales, or a fraction of the annual retail sales of all distributors in the country of those commodities, does not militate against the undesirability of directorates common to both corporations." *Id.* at 620.

[19] Exhibit "A" to Stip. One formal complaint issued during this period, *Dierks Forests*, 58 F.T.C. 304 (1961). The complaint was dismissed after the interlocking director resigned.

[20] Between 1972 and 1975, the Commission issued 19 formal complaints charging corporations with violation of Section 8. Each of these cases resulted in a consent settlement directed at *corporate* responsibility for compliance with Section 8. (Exhibit "A" to Stip.)

error since this has *not* been the Commission policy as revealed in the stipulated facts.

As for respondent's argument that SCM was discriminated against because it received "no notice whatsoever of the Commission's intention to file a complaint prior to issuance thereof" (SCM Main Brief, p. 27), there has never been a requirement in the Commission's rules that [12] any such advance notice be given.[21] But, as it happens, SCM did receive notice of the Commission's interest in a possible illegal interlock prior to issuance of the complaint.[22] There is no indication, however, that this notice, which SCM now regards as so imperative, inspired any pre-complaint action on the part of respondent to rid itself of Mr. Bond, or to prevent reoccurrence of Section 8 violations.

Finally, respondent maintains that this action has been rendered moot by the "voluntary" resignation of Bond from the Board of Directors of SCM after the complaint was issued. Although respondent itself recognizes that the mere discontinuance of an illegal act, particularly discontinuance after an investigation or formal action has begun, does not render a case moot, SCM contends that the surrounding facts demonstrate that no relief is necessary and the action must be dismissed as moot. SCM Main Brief, pp. 6-16.

[13] On the general question of mootness (and in the *very* context of a Section 8 case) the Supreme Court said in *United States* v. *W.T. Grant,* 345 U.S. 629 (1953), that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.,* does not make the case moot." *Id.* at 632. The Supreme Court added, however, that an action can be moot if the defendant can demonstrate "there is no reasonable expectation that the wrong will be repeated," but the burden of doing so "is a heavy one." *Id.* at 633.

In the instant case, the points cited by SCM to meet this "heavy" burden are: (1) Bond's immediate "voluntary" resignation and his assurance that he does not intend to serve on respondent's Board while a director of Kraftco; (2) respondent's assurance (by affidavit)

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[21] Prior to April 4, 1975, the Commission issued, but was not required to do so, "proposed complaints" under Part 2 of its rules for the purpose of encouraging consent settlements before a formal complaint was issued. After April 4, 1975, *all* complaints (including this one) were issued under Part 3. If a consent settlement is negotiated in the investigation stage, the complaint and consent settlement may be issued simultaneously. See 40 Fed. Reg., No. 60, p. 15235 (April 4, 1975). Respondent seems to be suggesting that under the new rules, which abolished Part 2, it has been treated differently than other Section 8 respondents because it has not been given an opportunity to have its complaint and consent order entered simultaneously. SCM Main Brief, pp. 27-28. In the first place, and contrary to respondent's representation, in *Kane-Miller,* Dkt. 9034, the Part 3 complaint alleging a Section 8 violation (issued on June 17, 1975 and *not* on July 17, 1975 as respondent asserts) was not accompanied by consent settlements. The matter was withdrawn from adjudication on December 19, 1975 for the purpose of considering consent agreements signed in October and November, 1975. Secondly, respondent's argument on this point is obscure, to say the least, since there is no indication that it wished to enter into a consent settlement at any stage of this proceeding.

[22] On March 7, 1975. (Sexton Aff. 1, ¶ 8.)

that Bond will not be re-elected to SCM's Board while he is a director of Kraftco or any other competitor of respondent; and (3) the lack of evidence of prior Section 8 or related violations by SCM. *W. T. Grant* establishes, however, that such grounds are insufficient to meet respondent's "heavy" burden in making a mootness defense. In that case, too, the defendant showed that the offending interlock no longer existed and it disclaimed any intention to revive the relationship. But the Supreme Court said that, "such a profession does not suffice to make a case moot although it is one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts." *Id.* at 633.

Despite the clear holding in *W. T. Grant* that a mootness defense ordinarily will not arise from the mere fact that the director has resigned and the respondent says it will not re-elect the offending director, SCM seeks refuge in the Supreme Court's refusal in that case to interfere with the District Court's denial of injunctive relief. In reviewing the discretionary power of the District Court with respect to injunctive relief, the Supreme Court said in *W. T. Grant* that it found no abuse of discretion on the facts of that case. But the Supreme Court indicated that the standard for injunctive relief — "some cognizable danger of recurrent violation, something more than a mere possibility * * *." (*Id.* at 633) remains nevertheless, a matter of discretion with the trier of the facts. Thus in subsequent cases the Court has said "[whether] further violations [are] sufficiently remote to make injunctive relief unnecessary * * * is [14] a matter for the trial judge." *United States* v. *Phosphate Export Assn.*, 393 U.S. 199, 203-204 (1968).[23]

The determination of how the trier of the facts — the administrative law judge, in the first instance, and later the Commission upon review of the record — should exercise this discretion is not materially advanced by respondent's mere repetition (in various versions) of the refrain "there is no cognizable danger of recurrent violation" (SCM Main Brief, pp. 7, 9, 10, 11, 15, 16; SCM Reply Brief, pp. 2, 3, 4, 10, 13; Sexton Aff. 2, ¶ 8): such self-serving declarations are entitled to no weight, especially when SCM is silent on what steps it has taken to avoid the danger of other unlawful interlocks.[24] In any event, if respondent's assessment of the danger of recurrence of a violation were the test, then, presumably, the Commission could

[23] See also *Treves* v. *Servel, Inc.*, 244 F. Supp. 773 at 777 (S.D.N.Y. 1965) where the court relying on *W. T. Grant* said "Beyond the mootness area lies the more difficult issue whether, as a matter of discretion, the court ought to dismiss plaintiff's request for injunctive relief."

[24] This is not to say that a mere voluntary undertaking by respondent to comply with the law would be an adequate safeguard for the future. *Clinton Watch Co.* v. *FTC*, 291 F.2d 838, 841 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962).

never issue a cease and desist order in any case. See *Hershey Chocolate Corp.* v. *FTC*, 121 F.2d 968, 971 (3d Cir. 1941).

By the same token, respondent does not demonstrate the absence of a danger of recurrence by asserting that it may be caught again if it violates the law. SCM seems to be suggesting that because its selection of directors is a matter of public information and must be reported to the SEC and the New York Stock Exchange that this somehow guarantees against recurrence of the violation. SCM Main Brief, pp. 9, 15-16. The cogency of this argument is somewhat less than compelling since neither these reporting requirements nor public disclosure of Bond's membership on SCM's Board (presumably to SCM's stockholders) prevented the very violation which is the subject of this complaint. Moreover, respondent's position on this point seems to assume it is the function of the public, or its stockholders, or the New York Stock Exchange, or the SEC, or the F.T.C. to protect SCM from [15] violating the law. To the contrary, the obligation to comply with Section 8 falls squarely on every corporation which meets the statutory requirements.

It is also apparent that neither *W. T. Grant* nor any other decision relating to the discretionary power of the trier of facts to issue a cease and desist order can be read as meaning that no substantive violation can be found and no order can be issued unless complaint counsel comes forward with proof that respondent is a corporate recidivist.[25] Such a cavalier approach to Section 8, allowing one or more excused violations, would mean that in administering the antitrust laws one has to assume, contrary to fact, that Congress intended a high level of permissiveness.

As for the language in *W. T. Grant* that the moving party must persuade the trier of the facts of the need for injunctive relief, this does not mean that once a violation is proven, complaint counsel must then undertake a protracted second trial relating to the remedy. It is significant that on the limited facts before it in *W. T. Grant* — the failure of the director to terminate the interlocks despite five years of fruitless negotiation with the Government, the refusal by the director to concede illegality, and his failure to promise not to commit similar violations in the future — the Supreme Court said "Were we sitting as a trial court, this showing might be persuasive." *Id.* at 634. That the Supreme Court did not overturn a contrary conclusion by the lower court — that is, that the District Court was *not* persuaded — represents no more than the usual deference, in the absence of a clear showing of abuse, which the

[25] As the Supreme Court said in *W. T. Grant*, "The purpose of an injunction is to prevent future violations * * * and, of course, it can be utilized even without a showing of past wrongs." 345 U.S. 629 at 633.

appellate body (*W. T. Grant* was a direct appeal to the Supreme Court) gives to the discretionary injunctive rulings of the trial court. See *Brown* v. *Chote,* 411 U.S. 452, 457 (1973).

From the lower court opinion, it is not possible to tell what would have persuaded the District Court in *W. T. Grant* that an order was indeed required, or how as a practical matter, the Government can hope to show any more than it actually did. Proof on the subject of the likelihood of future violations is bound [16] to be elusive at best since we are dealing with slippery issues of predictability of conduct and how assiduously a company will comply with the law when it is not compelled to do so by an order. To read *W. T. Grant,* however, as imposing a substantial burden in this respect would effectively frustrate enforcement of Section 8 which was specifically designed by Congress to avoid complex litigation. See *Protectoseal* v. *Barancik,* 485 F.2d 585, 589 (7th Cir. 1973). It would also be contrary to the clear holding of the Supreme Court that "once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *United States* v. *du Pont & Co.,* 366 U.S. 316, 334 (1961).

I believe *W. T. Grant* is properly read as leaving undisturbed what the Supreme Court has consistently said about the broad discretion which the Commission has to determine whether a cease and desist order is needed in order to make certain that an unfair method of competition or illegal trade practice is stopped and not resumed. *Jacob Siegel Co.* v. *FTC,* 327 U.S. 608 (1946); *FTC* v. *Mandel Bros.,* 359 U.S. 385, 392 (1959). The Commission has traditionally exercised this discretion in favor of issuing orders enjoining future violations even where it is certain that the precise acts involved in a case could not be repeated because of statutory revisions or abandonment of the business. See discussion and cases cited in *Rubbermaid Inc.,* Dkt. 8939, 3 CCH Trade Reg. Rep. ¶ 21,131 at pp. 20,985-20, 987 (April 13, 1976) [87 F.T.C. 676, 704-708].

In this case there are no extenuating circumstances or other persuasive reasons for departing from overwhelming Commission precedent in favor of a cease and desist order. Here, as far as one can tell, nothing has been discontinued by SCM (Bond resigned of his own accord when he, too, was named as a respondent) and there is no basis for assuming that meaningful changes in procedures will be made unless respondent is ordered to do so. SCM has insisted all along that as a corporation it is not subject to the prohibitions of Section 8, and it has not even given adequate assurances of voluntary compliance with the law in the selection of directors other than Bond. Surely, whatever SCM did to comply with the law prior to complaint

(assuming it did anything) was inadequate since it did not detect or prevent an unlawful interlock with its competitor Kraftco. In sum, I fail to see how the public interest is protected in any way unless SCM is compelled to take positive steps to prevent future recurrence of the same practice.

[17] As for the scope of the order, this is not a case where the remedy proposed by complaint counsel is only loosely connected to the illegal conduct and could only be justified under the "fencing in" rubric of *FTC* v. *National Lead Co.*, 352 U.S. 419, 431 (1957). The order which follows covers the *exact* same illegal practice as that charged in the complaint, and merely imposes a monitoring procedure which requires SCM to take certain minimal precautions in selecting directors to avoid interlocks. This is relief which is reasonably related to the unlawful practice which has been alleged and proven. *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608 (1946).

IV

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding, and over respondent SCM.

2. Respondent SCM was at all times material herein engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

3. Respondent SCM Corporation has violated Section 8 of the Clayton Act, 15 U.S.C. 19, and Section 5[26] of the Federal Trade Commission Act, 15 U.S.C. 45, by reason of the following:

(a) Respondent SCM and Kraftco are corporations which each have capital, surplus, and undivided profits aggregating more than $1,000,000.

(b) Respondent SCM and Kraftco are competitors in the sale of margarine, edible oils, and barbecue sauce.

(c) The elimination of competition with respect to the products cited in (b), above, by agreement between SCM and Kraftco would constitute a violation of the provisions of the antitrust laws.

(d) Richard C. Bond served on the Board of Directors of respondent SCM and Kraftco between 1967 and August 1, 1975.

4. This proceeding is not moot, and an order to cease and desist

[26] The complaint alleges a violation of both Section 8 and Section 5 of the Federal Trade Commission Act. I need not decide whether the substantive standard for judging an interlock may be different under Section 5 or whether Section 5 may reach an interlock which violates the policy of the Clayton Act although technically not within the four corners of Section 8. All the requirements of Section 8 have been met in this case, and my conclusion that Section 5 has been violated rests solely on the rule that the Federal Trade Commission Act registers all violations of the Clayton and Sherman Acts. *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-5 (1953).

against SCM is both appropriate and necessary for the protection of the public interest.

Accordingly, the following order will issue:

ORDER

1. *It is ordered,* That upon this order becoming final respondent SCM Corporation and its successors and assigns, shall forthwith cease and desist from having, and in the future shall not have, on their board of directors any individual who either:

(a) serves at the same time as a director of Kraftco Corporation, its successors or assigns, or any other corporation which competes with SCM Corporation in the production or sale of any product or service; or

(b) fails to submit to SCM Corporation any statement required by Paragraph Two of this order.

2. *It is further ordered,* That within thirty (30) days of the date of service of this order and prior to each election of directors or to the solicitation of proxies for such election, whichever is earlier, hereafter, SCM Corporation shall obtain a written statement from each member of its board of directors (except directors whose terms expire at the next election and who are not standing for re-election) and from each nominee for a directorship (who is not then a director) showing:

(a) the name and home mailing address of each director or nominee; and

(b) the name and principal office mailing address of, and a description of each product or service produced or sold by, each corporation which the director or nominee then serves as a director of, or at the time of the statement, has been nominated to serve.

Nothing in this paragraph shall be construed to relieve respondent of its obligation under Paragraph 1(a) hereof due to any error or omission contained in any written statement received pursuant to this paragraph.

3. *It is further ordered,* That within forty-five (45) days of the date of service of this order and annually for a period of ten (10) years thereafter, SCM Corporation shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. Copies of the statements obtained pursuant to Paragraph Two of this order shall be submitted to the Commission as part of the reports of compliance required by this paragraph. Nothing in this paragraph shall relieve SCM Corporation of its obligation to comply with Paragraphs One, Two, and Four of this

order once it is no longer required to submit reports of compliance to the Commission.

4. *It is further ordered,* That SCM Corporation shall notify the Commission at least thirty (30) days prior to any change in the corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

Concurring Statement By Chairman Collier

I concur in the Commission's Opinion, Findings of Fact, Conclusions of Law, and Order, except that I find it unnecessary to reach the question whether the director interlock in question violated Section 5 of the Federal Trade Commission Act. I conclude that a violation of Section 8 of the Clayton Act has been proven here, and that the order entered by the Commission is fully supported by that conclusion.

[1] Opinion of the Commission

By Dixon, *Commissioner:*

Complaint in this matter was issued on June 17, 1975, charging Kraftco Corporation ("Kraftco"), SCM Corporation ("SCM") and an individual, Richard C. Bond ("Bond") with violating Section 8 of the Clayton Act (15 U.S.C. 19) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) by virtue of Bond's simultaneous presence on the boards of directors of the two corporations.

The case was assigned for hearing to Administrative Law Judge ("ALJ") Morton Needelman. Subsequently the matter was withdrawn from adjudication with respect to Bond and [2] Kraftco, consent agreements with these parties were signed, and consent orders against them were issued on April 26 and May 6, 1976, respectively. The case against SCM was tried pursuant to a stipulated record, and Judge Needelman entered an initial decision sustaining the complaint and recommended entry of an order to cease and desist. The case is before us on respondent SCM's appeal from the ALJ's decision.

Initial Decision

It was not disputed, and Judge Needelman so found, that Bond served simultaneously on the Boards of Directors of SCM and Kraftco, that both corporations are engaged in commerce and have capital, surplus, and undivided profits aggregating more than $1,000,000, and

that the two corporations competed with each other in the sale of margarine, edible oils, and barbecue sauce. (I.D. 3-8.)[1] Sales by SCM in fiscal 1975 of products sold in competition with Kraftco were roughly $83 million, while Kraftco's sales in the same category approximated $258 million. (I.D. 7.)

The ALJ concluded that respondent had violated Section 8 of the Clayton Act and Section 5 of the F.T.C. Act. The Judge further concluded that the need for an order to cease and desist was not rendered moot by Bond's voluntary resignation from SCM's Board or by any other circumstances, and that entry of an order corresponding to the "Notice of Contemplated Relief" initially served with the complaint was necessary to prevent recurrence of Section 8 violations and protect the public interest.

[3] On appeal respondent argues that it has committed no violation of law; that if it has committed a violation there is nonetheless no necessity for the imposition of a remedial order; and that if there is a need for the imposition of a remedial order it should be no different from the consent order negotiated by co-respondent Kraftco.

LIABILITY OF CORPORATE RESPONDENT

(a) Clayton Act, Section 8

Respondent does not question that a violation of Section 8 has occurred, but it contends that only an individual director may be held liable for such a violation.

Respondent places its principal reliance upon the language of the Section which states in relevant part that:

> * * * no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination, or competition by agreement between them would constitute a violation of any of the provisions of the antitrust laws.

[4] Respondent contends that Section 8, by its terms, merely forbids *individuals* to be joint directors; it does not render *corporations* liable to suit for the use of interlocking directorates.[2]

[5] While the language of Section 8 read *in vacuo* perhaps leaves

[1] The following abbreviations are used throughout this opinion:
I.D. - Initial Decision, Finding No.
I.D. p. - Initial Decision, Page No.

[2] Our own review of the legislative history reveals no sign that this question was directly addressed during the course of Congressional debate over the Clayton Act. Respondent cites a statement of Rep. Nelson, at p. 21 of its brief, which it argues implies that he understood Section 8 to cover only individuals. Whether this is a valid or relevant inference, the opposite inference can plausibly be drawn from other comments in the Congressional debates, like

(Continued)

some doubt as to the entities its proscription is intended to cover, the language of Section 11, [15 U.S.C. 21] which provides for enforcement of Section 8, leaves none. In relevant part Section 11 provides that the Commission shall, upon a finding that any "person" (defined in 15 U.S.C. 12 to include corporations) has violated Section 8.

> * * * issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or *rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act,* if any there be, in the manner and within the time fixed by said order * * *. [emphasis added]

Needless to say, only a corporation may "rid itself" of directors. SCM suggests that the underlined words are a vestigial remnant intended only to cover banks and the Federal Reserve Board, but there is nothing in the wording of the statute or in its legislative history to support this distinction. (I.D. p. 7.) Rather, Section 11 by its plain terms empowers the Commission to remedy violations of Section 8 by entering an order to cease and desist against *corporations,* and this Section would be robbed of meaning by a construction that excluded corporations from the entities covered by Section 8. We believe, instead, that when Section 8 forbids the presence of a director on the boards of competing corporations, it [6] speaks both to the director and to the competing corporations, and all may be held accountable for ignoring its dictates.

Respondent correctly points out that the Supreme Court reserved judgment on this issue in a case in which it arose, *United States* v. *W.T. Grant Co.,* 345 U.S. 629, 634n.9 (1953). However, at least one lower court has enjoined a corporation from Section 8 violations in a case brought to enforce that Section, *United States* v. *Sears, Roebuck and Co.,* 111 F. Supp. 614 (S.D.N.Y. 1953), *decree construed,* 165 F. Supp. 356 (S.D.N.Y. 1958), a second court has recently asserted the same authority[3], and the imposition of corporate liability is in accord with decades of Justice Department and Federal Trade Commission

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Rep. Nelson's not directed to the precise issue here, which seem to treat Section 8 as though it ...d obligations on corporations. For example:

> "In drafting the provisions of Section 9 [now Section 8] your committee has end... to carry out the recommendations of the President. In order that the corporations affected may have ... time to readjust their boards of directors in keeping with the requirements of the act [a two year p... eriod is allowed] * * *" H.R. No. 627, H.R. 15656, p. 18, Part 1, 63 Cong., 2d Session (1914).
>
> "This section will be full of difficulty and peril for small corporations, and will affl... em in far greater degree than it will large ones, against which the legislation is presumed to be aimed.
>
> "The use of interlocking directorates serves many useful purposes, and because in ...e instances it has been used to foster monopoly or create a restraint of trade, does not furnish a good ...son why the use of interlocking directorates generally should be forbidden." *Ibid.,* Part 2, p. 8.

On balance we think comments such as these, or those allegedly to the opposite effect cit... respondent, shed little light on the question here in issue.

[3] *United States* v. *Crocker National Corp.,* No. C-75-2108, *United States* v. *BankAmerica* ...rp., No. C-75-2109 (N.D. Cal., 8/27/76), [1976] 5 Trade Reg. Rep. (1976-2 CCH Trade Cases) ¶ 61,044. After noti... that the corporate

(Continued)

enforcement of the Clayton Act, via voluntary action, consent agreements, and litigation. To absolve corporations of liability for sharing directors with competitors would, without question, severely undermine enforcement of the law, since any corporation could maintain such an interlocking directorate and, if detected, simply replace the ousted director with another interlocking board member, again without fear that detection could lead to anything more than the director's resignation. Sanctions [7] against individuals alone are likely to be of limited effect, because there are hundreds of thousands of potential corporate directors at any given time. Sanctions against a much smaller number of corporations are far likelier to effectuate the purposes of Section 8, since an order against a corporation will prevent a far larger number of potential interlocks than one against an individual.

For the foregoing reasons we conclude that respondent's conduct violates the Clayton Act and may be proscribed by this Commission. We do not quarrel with respondent's proposition that the "plain meaning" of a statute may not be disregarded in order to effect its purpose. All that is "plain" in this instance, however, is that the Clayton Act authorizes the Commission to enter an order to remedy what respondent has done. Read in this light, we think Section 8 is properly construed to prohibit corporations as well as individuals from effecting interlocking directorates. The fact that this interpretation is most likely to effectuate the Congressional purpose is only a further reason to favor it.

(b) Federal Trade Commission Act, Section 5

We also conclude that respondent's conduct runs afoul of Section 5 of the Federal Trade Commission Act, which prohibits, *inter alia*, unfair methods of competition. It is well established that the prohibitions of Section 5 extend to practices which offend the underlying spirit and policy, as well as the letter, of the antitrust laws, *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 239-244 (1972); *FTC* v. *Brown Shoe*, 384 U.S. 316 (1966); *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953). Assuming *arguendo* that illegally interlocked corporations must be allowed to escape liability

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defendants in these interlock cases had argued that Section 8 applied only to individuals, Judge Peckham observed that:

> "[r]egardless of whether this contention is correct, it is clear, and the defendants conceded at oral argument, that were this court to decide that injunctive relief were appropriate in these cases, this court could, if it chose to, enjoin the defendant corporations, as well as the individual defendants from further violating Section 8. *See e.g.*, 15 U.S.C. § 25." (p. 69,673, footnotes omitted)

15 U.S.C. 25 is Section 15 of the Clayton Act (the Justice Department/Federal Court analog to Section 11), which empowers the district courts to "prevent and restrain violations of this Act."

through the allegedly porous wording of Section 8, no better illustration of a practice offensive to the spirit and policy of the antitrust laws if not their letter can be imagined than the employment and retention by a corporation of a director whose presence on the board itself violates the law. Application of Section 5 in such a case does no more than effectuate the clear purpose of the Clayton Act.

Section 5 has been similarly applied in an earlier case also arising under the Clayton Act. In *Grand Union Co.* v. *FTC*, 300 F. 2d 92 (2d Cir. 1962), the court sustained the [8] Commission's conclusion that Grand Union in its role as a buyer had violated Section 5 by knowingly soliciting and receiving payments made by suppliers in violation of Section 2(d), 15 U.S.C. 13(d). The court so found despite the fact that Section 2(d) did not expressly mention buyers. In rejecting the argument that the Commission had applied Section 5 to effect an unwarranted expansion of the Clayton Act the Court reasoned:

> Nor can we accept the notion that the Commission is here legislating a "new antitrust prohibition." The practice itself is clearly proscribed * * * The Commission is not upsetting specific Congressional policies; the proceedings did not "circumvent the essential criteria of illegality prescribed by the express prohibitions of the Clayton Act." No economic activity, once lawful, has been suddenly brought within the prohibition of the antitrust laws. Jurisdiction, perhaps, has been expanded from * * * technical confines * * * but only fully to realize the basic policy of the * * * Act * * *. 300 F.2d at 98 (footnotes omitted).

Here, as well, the application of Section 5 does no more than permit the effectuation of a Congressional policy by applying that policy to the entities in the best position to ensure its success.

That Congress specifically contemplated the application of Section 5 to interlocking directorates is, moreover, suggested by some of the legislative history cited by complaint counsel. In explaining the language of Section 5, for example, the Senate Interstate Commerce Committee reported that:

> [9] The Committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous *unfair practices, such as* local price cutting, *interlocking directorates,* and holding companies intended to restrain substantial competition. [emphasis added][4]

For these reasons, then, we conclude that respondent's conduct runs afoul of Section 5 of the Federal Trade Commission Act.

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[4] S. Rep. No. 597, 63rd Congress, 2d Sess. 13 (1914) *See also* the remarks of Senator Newlands, Chairman of the Committee, on the floor, 51 Cong. Rec. 11106, 11537, 12980 (1914).

[10] NECESSITY FOR AN ORDER

Respondent argues that even assuming it has been found to have violated the law, it should nevertheless not be ordered to desist from future violations, since it has halted the prior infraction and promises never to repeat it.[5] The administrative law judge rejected this argument and we fully concur in his conclusion and in his reasoning, at I.D. pp. 12-16.

The violation which occurred here continued for several years and was terminated only when pointed out by the Commission. It was, moreover, not an insignificant, trivial, or technical infraction. In 1975, SCM and Kraftco competed with respect to more than $300 million worth of business, of which more than $80 million were sales by SCM. While these figures are only a small fraction of the total sales of the companies, $300 million or $80 million is by any measure a great deal of trade to be jeopardized by the sorts of anticompetitive agreements which interlocking directorates facilitate, and which Congress meant to stop before they got started when it imposed its ban on interlocks between competitors, cf. *Sears, Roebuck, supra.* 111 F. Supp. 614 at 621. If one regards the antitrust laws seriously, and we do, this was a serious violation.

It may be that respondent does not intend to utilize illegally interlocked directorates in the future. But it probably did not intend to use them when it hired Mr. Bond either. We cannot, however, resist the conclusion that SCM paid inadequate attention to whether it acted [11] permissibly or not, and there is nothing whatsoever in the record to suggest it will not continue to pay insufficient attention in retaining future directors unless ordered to do so.[6]

Under these circumstances we find nothing to challenge the ALJ's conclusion that an order is appropriate here. The *W.T. Grant* case, *supra,* cited by respondent held no more than that it was within the discretion of a trial court judge to withhold injunctive relief where a violation had been halted. The Court strongly suggested that it would not have quarreled with the imposition of injunctive relief in the same case, and obviously did not intend to disturb a long line of cases, prior and subsequent, holding that discontinuance of a violation is not proper grounds for omission of a Commission order, *e.g., Fedders*

[5] SCM promises never to rehire Bond so long as he directs Kraftco or any other corporation competing with SCM (Appeal Brief, p. 16). It does not promise to avoid other unlawful interlocks with Kraftco or anyone else.

[6] SCM argues there is nothing which requires it to announce what steps it will take or has taken to avoid interlocks. (Appeal Brief, p. 18). We completely agree, and if those undisclosed procedures it uses to comply with the law had proven adequate to prevent this violation their identity would be no concern of ours. However, since a violation involving a large amount of commerce did occur and persist for several years, and since the record discloses nothing of the procedures used by respondent to prevent such occurrences, we are hard pressed to see what other conclusion can be reached than that SCM's procedures are inadequate to ensure nonrepetition of future violations.

Co. v. *FTC,* 529 F.2d 1398 (2d Cir.), *cert. denied,* 45 U.S.L.W. 3244 (Oct. 5, 1976); *Coro Inc.* v. *FTC,* 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied,* 380 U.S. 954 (1965); *Clinton Watch Co.* v. *FTC,* 291 F.2d 838, 841 (7th Cir. 1961), *cert. denied,* 368 U.S. 952 (1962); [12] *Galter* v. *FTC,* 186 F. 2d 810, 813 (7th Cir.), *cert. denied,* 342 U.S. 818 (1951); *Eugene Dietzgen* v. *FTC,* 142 F. 2d 321, 330 (7th Cir.), *cert. denied,* 323 U.S. 730 (1944). *See also, United States* v. *Newmont Mining Corp.,* 34 F.R.D. 504, 505 (S.D.N.Y. 1964): "It is plain that mere resignation of a directorship allegedly held in violation of §8 of the Clayton Act does not render an action for violation of that Section moot. The *Grant* case expressly so holds."

Respondent's position here would necessitate that having shown a violation, complaint counsel then demonstrate by affirmative evidence the likelihood of future additional violations. To the contrary, we think the violation is itself the best evidence of the possibility of future such occurrences, and that the burden rests with respondent to demonstrate that violations will not recur before consideration may be given to omitting an order, *United States* v. *W.T. Grant Co., supra* at 633.

[13] THE ORDER

The administrative law judge entered an order corresponding generally to the provisions of the "Notice of Contemplated Relief" served upon the parties at the time the complaint was issued. Basically this order forbids SCM to violate Section 8 in the future (Par. 1), and establishes a mechanism for implementing and monitoring such compliance by requiring that future candidates for director provide a list of the products manufactured by companies which they already direct (Par. 2.) Copies of these reports shall be filed with the Commission periodically, for a period of 10 years, and SCM may not hire a director who has not provided the required report.

SCM argues generally that its order should be no broader than that consented to by Kraftco and directs particular objection to Paragraph 2, contending that the requirement that prospective directors list all products manufactured by companies of which they are presently directors may prove unduly burdensome in cases of companies which manufacture numerous products.

Having reviewed the order recommended by the ALJ, we believe it is a generally appropriate disposition of this matter, narrowly tailored to prevent recurrence of the type of infraction that gave rise to this proceeding, *i.e.,* the use of an interlocking directorate violative of Section 8 of the Clayton Act and Section 5 of the F.T.C. Act. We believe that Paragraph 2 is necessary, initially, to provide a ready

means by which SCM may effect compliance by itself and its directors and prospective directors with Section 8, and also a means by which the Commission may check on SCM's compliance since it will review the product lists submitted by SCM directors. We have changed the necessity for "product description" to "product list" and as modified we do not believe this requirement should be unnecessarily burdensome. We believe that even large corporations have readily available a list or lists of the products they manufacture. However, we believe there is no necessity that this requirement exist in perpetuity, and we shall instead limit its duration to a period of five years. During this time it will provide a mechanism for SCM to comply with the law and for the Commission to monitor its compliance. Thereafter, SCM will [14] remain under obligation to adhere to Section 8, but it will be at liberty to adopt alternative methods by which to do so, as its experience dictates.

We have also modified Paragraph 1(a) to make clear that its prohibition on interlocks with Kraftco Corporation applies only while SCM and Kraftco are competitors. In addition we have modified the class of competitors with which SCM may not interlock to exclude any "subsidiaries," "sisters," or "parents" as defined in the order, and amended the reporting requirement accordingly. In all other respects we have retained the order recommended by the administrative law judge, and conclude that it is in the public interest that such an order be entered.

Respondent argues, as noted above, that if an order must be entered it should be no different, or at least no more stringent, than the consent order to which co-respondent Kraftco earlier agreed. Any more comprehensive order, protests respondent, would be discriminatory and tantamount to punishing it for having exercised its constitutional right to contest the charges against it.[7] SCM seeks to bolster its argument with the following syllogism: In accepting a consent order the Commission certifies that it is in the public interest; a litigated order must similarly be in the public interest; therefore the Kraftco consent order is a sufficient disposition of this proceeding and anything in excess of its provisions must amount to punishing SCM for litigating.

[15] An unstated premise of this argument is, of course, that

[7] Respondent also makes certain other charges of discrimination which are patently frivolous. It cites the Commission's past practice of forebearing to obtain an order where the interlock was dissolved. But it does not deny that this enforcement strategy was modified well in advance of the instant matter, since which time the Commission has sought cease and desist orders from many alleged Section 8 violators. (I.D. p. 11) Respondent also argues that it was discriminated against by being sued without being previously notified of the charges against it. Assuming *arguendo* that this was the case (there is some dispute as to whether it was, I.D. pp. 11-12) we can apprehend no prejudice since respondent was subsequently given an opportunity to negotiate a consent settlement but evinced no apparent interest (I.D. p. 12, n. 21).

Kraftco, the consent settlor, may be assumed to have violated the law in equal measure as SCM, so that the remedy appropriate to Kraftco may somehow be the test of that appropriate to SCM. In fact, of course, Kraftco in settling admitted no legal liability, and gave up its opportunity to defend the charges against it and to present any evidence which might tend to mitigate the force of incriminating evidence. In light of this it is somewhat presumptuous for this Commission or SCM to assume that Kraftco's order provides an absolute measure of what would satisfy the public interest with respect to SCM.

However, assuming *arguendo* that it is at all relevant to compare the treatment of a party which has not admitted liability and that accorded a party adjudged in violation, we nonetheless find no impropriety in the mere imposition of varying orders upon settlors and non-settlors in the same case.

The "public interest" on behalf of which this Commission is enjoined to act comprehends not only the justness with which particular disputes are resolved, but the speed and efficiency with which resolutions are obtained as well. The public unquestionably has a strong interest in the ability of its law enforcement institutions to resolve controversies swiftly and at minimum cost. Every party accused of wrong-doing in our system has the right to insist that the government prove the charges against it, but if every accused were to exercise that right to its fullest extent the administration of justice would be seriously retarded if not actually imperiled. As a result, we believe the Commission does not act improperly when, in considering acceptance of a proferred consent order, it weighs as part of the requisite public interest the savings in time, money, and uncertainty which the settlement will provide.

It follows from this that the terms of a consent settlement may, consistently with the public interest, be less stringent than the corresponding order obtained through litigation, and conversely, that an order entered after litigation may properly be more stringent than an order entered after settlement.

[16] Moreover, SCM does not suggest, nor could it, that the order entered here will disadvantage it in competing with Kraftco, or with any other company. Nor does the order do more than prevent the recurrence of violations of law previously engaged in. This being the case, we cannot conclude that the order is punitive merely because it is broader in some respects than an order entered after negotiations with a party charged with but not formally adjudged to have committed the same offense.

An appropriate order is appended.

[1] FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying Opinion having determined to deny the appeal:

It is ordered, That the initial decision of the administrative law judge, pages 1-18, be adopted as the Findings of Fact and Conclusions of Law of the Commission.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

[2] ORDER

The following definitions shall apply in this order:

"Subsidiary" of SCM means any corporation, 50 percent or more of the voting stock of which is owned or controlled, directly or indirectly, by SCM.

"Parent" of SCM means any corporation which owns or controls, directly or indirectly, 50 percent or more of the voting stock of SCM.

"Sister" of SCM means any subsidiary of a parent of SCM.

1. *It is ordered,* That respondent SCM Corporation and its successors and assigns shall forthwith cease and desist from having, and in the future shall not have, on their board of directors any individual who either:

(a) serves at the same time as a director of Kraftco Corporation, its successors or assigns (so long as Kraftco and SCM Corporation compete in the production or sale of any product or service), or serves at the same time as a director of any other corporation (other than a subsidiary, parent, or sister of SCM) which competes with SCM Corporation in the production or sale of any product or service; or

(b) fails to submit to SCM Corporation any statement required by Paragraph Two of this order to be obtained by SCM.

2. *It is further ordered,* That within thirty (30) days of the effective date of this order, and prior to each election of directors or prior to the solicitation of proxies for such election, whichever is earlier, SCM Corporation shall obtain a written statement from each member of its board of directors (except directors whose terms expire at the next election and who are not standing for re-election) and

from each nominee for a directorship (who is not then a director) showing:

(a) the name and home mailing address of each director or nominee; and

(b) the name and principal office mailing address of, and a listing of each product or service [3] produced or sold by, each corporation which the director or nominee then serves as a director, or has been nominated to serve as a director at the time of the statement.

The requirements of this paragraph shall not apply to elections of directors occurring after five years from the effective date of this order, nor shall directors or nominees be required to list products or services of subsidiaries, sisters, or parents of SCM Corporation.

Nothing in this paragraph shall be construed to relieve respondent of its obligation under Paragraph 1(a) hereto due to any error or omission contained in any written statement received pursuant to this paragraph.

3. *It is further ordered,* That within forty-five (45) days of the effective date of this order and annually for a period of ten (10) years thereafter, SCM Corporation shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. Copies of the statements obtained pursuant to Paragraph Two of this order shall be submitted to the Commission as part of the reports of compliance required by this paragraph during the first five (5) years. Nothing in this paragraph shall relieve SCM Corporation of its obligation to comply with Paragraphs One and Four of this order once it is no longer required to submit reports of compliance to the Commission.

4. *It is further ordered,* That SCM Corporation shall notify the Commission at least thirty (30) days prior to any change in the corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

IN THE MATTER OF

RAPPERSWILL CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2861. Complaint, Jan. 12, 1977 — Decision, Jan. 12, 1977

Consent order requiring a New York City manufacturer of building insulation, among other things, to cease misrepresenting that its products are non-combustible, non-flammable, or non-toxic; that urea-formaldehyde foam has been certified "non-combustible," that it is not included in the F.T.C.'s cellular plastics activities; and failing to make required disclosures with respect to numerical flame spread rating representations. Further, respondents are required to send certain building officials and previous purchasers of their products a prescribed statement noting that their products cannot be considered "non-combustible" in actual fire conditions and should be installed accordingly.

Appearances

For the Commission: *Lawrence S. Blumberg.*

For the respondents: *David Greene, Aberman, Greene & Locke,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof, hereinafter more particularly described and designated as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Rapperswill Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 305 East 40th St., New York, New York.

Respondent Rapco Chemical, Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of South Carolina, with its principal office and place of business at 3231 Bryson Drive, Florence, South Carolina.

Respondent Rapco, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business at 518 South 11th St., Richmond, California.

PAR. 2. Respondent companies are engaged in the manufacture, marketing and sales of cellular plastics products, including urea-formaldehyde foam, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of its business, respondents have represented that certain of their urea-formaldehyde foam products are either "non-flammable," "non-combustible," "non-combustible per ASTM E-136-65," "nontoxic," or not included in F.T.C. actions regarding plastics flammability.

PAR. 4. In truth and in fact, respondents' urea-formaldehyde foam is not non-combustible, non-flammable, or non-toxic. It was included within the activities of the Federal Trade Commission referred to by respondents regarding cellular plastics, namely, the Commission's investigation and order, In the Matter of the Society of the Plastics Industry, Inc., et al., Dkt. C-2596, and the Commission's proposed trade regulation rule, "Disclosure of Combustion Characteristics in the Marketing and Certification of Cellular Plastics," 16 CFR 439. Furthermore, ASTM E-136-65 is an obsolete test; respondents' products would not be rated "non-combustible" under the currently accepted standard, ASTM E-136-73.

Therefore, these representations were false, deceptive and had a tendency and capacity to mislead consumers, builders, building officials and the public.

PAR. 5. In the course and conduct of their business as aforesaid, each of the respondent companies, has been in substantial competition in or affecting commerce with other corporations, firms, and individuals, in the sale and distribution of cellular plastics products.

PAR. 6. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Rapperswill Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 305 East 40th St., New York, New York.

Respondent Rapco Chemical, Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of South Carolina, with its principal office and place of business at 3231 Bryson Drive, Florence, South Carolina.

Respondent Rapco, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business at 518 South 11th St., Richmond, California.

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That Rapperswill Corporation, Rapco Chemical, Incorporated, Rapco, Inc., (hereinafter referred to as "respondents"), and respondents' successors, assigns, officers, representatives, agents and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with the advertising, offering for sale, selling or distributing in commerce within the

United States of urea-formaldehyde foam and other cellular plastics products (hereinafter referred to as "Products") do forthwith:

A. Cease and desist from:

1. Using, publishing or disseminating, or encouraging others to use, publish or disseminate, directly or indirectly, orally or in writing, whether or not in conjunction with or with reference to any test or standard, such descriptive terminology or expressions as "non-combustible," "non-burning," "self-extinguishing," or "non-toxic," or any other term, expression, product designation or trade name of substantially the same meaning, except that such terminology or expression may be used with respect to any product hereafter developed which is, in fact, non-combustible, non-burning, self-extinguishing, or non-toxic, as the case may be, under actual fire conditions, and except that reference may be made to numerical flame spread ratings where (in the case of written reference) the following statement is included as prominently as, and in close conjunction to, such reference:

> This numerical flame spread rating is not intended to reflect hazards presented by this or any other material under actual fire conditions.

or where (in the case of oral reference) a disclosure that the numerical flame spread rating is not intended to reflect hazards under actual fire conditions is made in conjunction with such oral reference:

2. Representing that urea-formaldehyde foam is not included within activities of the Federal Trade Commission with respect to cellular plastics;

3. Representing that urea-formaldehyde foam is tested, passes, is certified or is rated as "non-combustible" under the test method known as ASTM E-136-65.

B. Establish and implement a program to identify previous purchasers from respondent of Products since October 1, 1972, and to supply each purchaser so identified with a notice in the form of Appendix A hereof within 120 days from the date this order becomes final.

C. Take all necessary and appropriate actions to inform present and future employees having managerial, sales, marketing, or research responsibility regarding Products and all distributors or franchisees of Products of the provisions of Paragraph A and Appendix A of this order and to enforce compliance therewith by such persons by:

1. Furnishing each present employee, distributor or franchisee

within thirty days from the effective date of the order, and each such future employee, distributor or franchisee within thirty days of his assignment to managerial, sales, marketing, or research responsibility regarding Products, with a copy of Paragraph A and Appendix A together with a written notice, over the signature of the respondents' chief executive officer, which promulgates the policy required in Paragraph A, and (a) which notifies each employee, distributor or franchisee that respondent will take appropriate disciplinary action which shall, in the event of willful or repeated violations, consist of fine, suspension or dismissal, against any employee who engages in acts or practices prohibited by Paragraph A, and (b) which notifies each distributor or franchisee that respondent will cancel all contracts for the sale or distribution of products in the event of violation of the terms of Paragraph A; and

2. Requiring appropriate periodic written assurance from each such person that his business practices conform with the requirements of Paragraph A of this order.

D. Cease and desist from paying, directly or indirectly, any agent, distributor, or franchisee, or any other person for the preparation, dissemination or publication of any advertising or promotional material which does not comply with the provisions of Paragraph A of this order.

E. Within thirty days of the effective date of this order, supply a copy of the Notice contained in Appendix A to the International Conference of Building Officials, Building Officials and Code Administrators, Southern Building Code Congress, National Building Code, the National Fire Protection Association, and each federal, state or local building department or other agency or other organization from which respondent has sought acceptance or approval of its Product for use in building construction.

F. Submit to the Commission within sixty (60) days and one hundred twenty (120) days after service upon them this order, a report, in writing, setting forth in detail the manner and form in which respondents have complied with the order and thereafter to submit such other reports relating to the subject matter of this order as the Commission may thereafter direct.

G. Notify the Commission at least thirty days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries engaged in the manufacture or distribution of products in the United States, or any other change in the corporation which may affect compliance obligations arising out of the order.

Commissioner Dole did not participate.

APPENDIX A

IMPORTANT NOTICE REGARDING THE FLAMMABILITY OF UREA-FORMALDEHYDE FOAM

The flammability characteristics of urea-formaldehyde foam and certain cellular plastics used as building insulation are tested pursuant to numerous test methods and standards. Included among these are ASTM E-84, E-136, E-162, D-635, and D-1692; UL 94 and 723; and NFPA 255. The Federal Trade Commission considers that these standards are not accurate indicators of the performance of the tested materials under actual fire conditions and that they are only valid as a measurement of the performance of materials under specific, controlled test conditions. The terminology associated with the above tests or standards, such as "non-burning," "self-extinguishing," "non-combustible," or "25 (or any other) flame spread" is not intended to and may not reflect the hazards presented by such products under actual fire conditions.

No urea-formaldehyde foam product that is currently marketed can be considered "non-combustible." Moreover, some hazards associated with numerical flame spread ratings for such products derived from test methods and standards may vary significantly from those which would be expected of other products with the same numerical rating.

In order to protect against fire hazard, urea-formaldehyde foam should not be installed in an exposed or unprotected condition. This notice is not intended to address the hazards presented by any proprietary product. The manufacturer of each particular product should be consulted for complete instructions to minimize the risks that may be involved in the use of the product.

The Federal Trade Commission, Washington, D.C. 20580, requests that any representation that is inconsistent with the terms of this notice be brought to its attention.

This notice is distributed by Rapperswill Corporation pursuant to agreement with the Federal Trade Commission.

IN THE MATTER OF

BREKKE ENTERPRISES

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2862. Complaint, Jan. 12, 1977 — Decision, Jan. 12, 1977

Consent order requiring a Tacoma, Washington, building insulation manufacturer, among other things, to cease misrepresenting that its products are non-combustible, non-flammable, or non-toxic; that urea-formaldehyde foam has been certified "non-combustible," that it is not included in the F.T.C.'s cellular plastics activities; and failing to make required disclosures with respect to numerical flame spread rating representations. Further, respondents are required to send certain building officials and previous purchasers of their products a prescribed statement noting that their products cannot be considered "non-combustible" in actual fire conditions and should be installed accordingly.

Appearances

For the Commission: *Lawrence S. Blumberg.*
For the respondent: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Brekke Enterprises, hereinafter more particularly described and designated as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Brekke Enterprises is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal office and place of business located at 1320 Tidehaven Road East, Tacoma, Washington.

PAR. 2. Respondent is engaged in the manufacture, marketing and sales of cellular plastics products, including urea-formaldehyde foam, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of its business, respondent has represented that certain of its urea-formaldehyde foam products are either "non-flammable," "non-combustible," "non-combustible per ASTM E-136-65," or "nontoxic."

PAR. 4. In truth and in fact, respondent's urea-formaldehyde foam

is not non-combustible, non-flammable, or non-toxic. Furthermore, ASTM E-136-65 is an obsolete test; respondent's products would not be rated "non-combustible" under the currently accepted standard, ASTM E-136-73.

Therefore, these representations were false, deceptive and had a tendency and capacity to mislead consumers, builders, building officials and the public.

PAR. 5. In the course and conduct of its business as aforesaid, respondent has been in substantial competition in or affecting commerce with other corporations, firms, and individuals, in the sale and distribution of cellular plastics products.

PAR. 6. The aforesaid acts and practices of respondents, as alleged herein, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Brekke Enterprises is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal office and place of business located at 1320 Tidehaven Road East, Tacoma, Washington.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That Brekke Enterprises, (hereinafter referred to as "respondent"), and respondent's successors, assigns, officers, representatives, agents and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with the advertising, offering for sale, selling or distributing in commerce within the United States of urea-formaldehyde foam and other cellular plastics products (hereinafter referred to as "Products") do forthwith:

A. Cease and desist from:

1. Using, publishing or disseminating, or encouraging others to use, publish or disseminate, directly or indirectly, orally or in writing, whether or not in conjunction with or with reference to any test or standard, such descriptive terminology or expressions as "non-burning," "self-extinguishing," "non-combustible," "non-toxic," or any other term, expression, product designation or trade name of substantially the same meaning, except that such terminology or expression may be used with respect to any product hereafter developed which is, in fact, non-combustible, non-burning, self-extinguishing, or non-toxic, as the case may be, under actual fire conditions, and except that reference may be made to numerical flame spread ratings where (in the case of written reference) the following statement is included as prominently as, and in close conjunction to, such reference:

> This numerical flame spread rating is not intended to reflect hazards presented by this or any other material under actual fire conditions.

or where (in the case of oral reference) a disclosure that the numerical flame spread rating is not intended to reflect hazards under actual fire conditions is made in conjunction with such oral reference;

2. Representing that urea-formaldehyde foam is tested, passes, is

certified or is rated as "non-combustible" under the test method known as ASTM E-136-65.

B. Establish and implement a program to identify previous purchasers from respondent of Products since January 1, 1972, and to supply each purchaser so identified with a notice in the form of Appendix A hereof within 120 days from the date this order becomes final.

C. Take all necessary and appropriate actions to inform present and future employees having managerial, sales, marketing, or research responsibility regarding products and all distributors or franchisees of Products of the provisions of Paragraph A and Appendix A of this order and to enforce compliance therewith by such persons by:

1. Furnishing each present employee, distributor or franchisee within thirty days from the effective date of the order, and each such future employee, distributor or franchisee within thirty days of his assignment to managerial, sales, marketing, or research responsibility regarding Products, with a copy of Paragraph A and Appendix A together with a written notice, over the signature of the respondent's chief executive officer, which promulgates the policy required in Paragraph A, and (a) which notifies each employee, distributor or franchisee that respondent will take appropriate disciplinary action which shall, in the event of willful or repeated violations, consist of fine, suspension or dismissal, against any employee who engages in acts or practices prohibited by Paragraph A, and (b) which notifies each distributor or franchisee that respondent will cancel all contracts for the sale or distribution of products in the event of violation of the terms of Paragraph A; and

2. Requiring appropriate periodic written assurance from each such person that his business practices conform with the requirements of Paragraph A of this order.

D. Cease and desist from paying, directly or indirectly, any agent, distributor, or franchisee, or any other person for the preparation, dissemination or publication of any advertising or promotional material which does not comply with the provisions of Paragraph A of this order.

E. Within thirty days of the effective date of this order, supply a copy of the Notice contained in Appendix A to the International Conference of Building Officials, Building Officials and Code Administrators, Southern Building Code Congress, National Building Code, the National Fire Protection Association, and each federal, state or local building department or other agency or other organization from

which respondent has sought acceptance or approval of its Products for use in building construction.

F. Submit to the Commission within sixty (60) days and one hundred twenty (120) days after service upon them of this order, a report, in writing, setting forth in detail the manner and form in which respondent has complied with the order and thereafter to submit such other reports relating to the subject matter of this order as the Commission may thereafter direct.

G. Notify the Commission at least thirty days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries engaged in the manufacture or distribution of products in the United States, or any other change in the corporation which may affect compliance obligations arising out of the order.

Commissioner Dole did not participate.

APPENDIX A

IMPORTANT NOTICE REGARDING THE FLAMMABILITY OF UREA-FORMALDEHYDE FOAM

The flammability characteristics of urea-formaldehyde foam and certain cellular plastics used as building insulation are tested pursuant to numerous test methods and standards. Included among these are ASTM E-84, E-136, E-162, D-635, and D-1692; UL 94 and 723; and NFPA 255. The Federal Trade Commission considers that these standards are not accurate indicators of the performance of the tested materials under actual fire conditions and that they are only valid as a measurement of the performance of materials under specific, controlled test conditions. The terminology associated with the above tests or standards, such as "non-burning," "self-extinguishing," "non-combustible," or "25 (or any other) flame spread" is not intended to and may not reflect the hazards presented by such products under actual fire conditions.

No urea-formaldehyde foam product that is currently marketed can be considered "non-combustible." Moreover, some hazards associated with numerical flame spread ratings for such products derived from test methods and standards may vary significantly from those which would be expected of other products with the same numerical rating.

In order to protect against fire hazard, urea-formaldehyde foam should not be installed in an exposed or unprotected condition. This notice is not intended to address the hazards presented by any proprietary product. The manufacturer of each particular product should be consulted for complete instructions to minimize the risks that may be involved in the use of the product.

The Federal Trade Commission, Washington, D.C. 20580, requests that any representation that is inconsistent with the terms of this notice be brought to its attention.

This notice is distributed by Brekke Enterprises pursuant to agreement with the Federal Trade Commission.

IN THE MATTER OF

HUDSON PHARMACEUTICAL CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2860. Complaint, Jan. 13, 1977 — Decision, Jan. 13, 1977

Consent order requiring a Borough of West Caldwell, N.J., manufacturer and distributor of children's vitamin supplements, among other things, to cease inducing the dissemination of or disseminating any advertisements relating to vitamin supplements or preparations designed primarily for use by children where such advertisements are directed to children.

Appearances

For the Commission: *Jonathan A. Sheldon.*

For the respondent: *Jerry S. Cohen, Kohn, Savett, Marion & Graf,* P.C., Philadelphia, Pa.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Hudson Pharmaceutical Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Hudson Pharmaceutical Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal offices and place of business located at 21 Henderson Drive, Borough of West Caldwell, State of New Jersey.

PAR. 2. Respondent Hudson Pharmaceutical Corporation is now and has been engaged in the packaging, advertising, offering for sale, sale and distribution of vitamin supplements designed for use by children, including vitamin supplements designated "Spider-Man Vitamins" and "Spider-Man Vitamins with Iron." These vitamin supplements are purchased for the use of children.

PAR. 3. In the course and conduct of its business, respondent Hudson Pharmaceutical Corporation now transports and has transported and has caused said vitamin supplements to be transported from its plant and facilities to purchasers in various states other than the state of origin. Respondent Hudson Pharmaceutical Corporation

maintains, and at all times herein has maintained, a substantial course of trade in said vitamin supplements in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

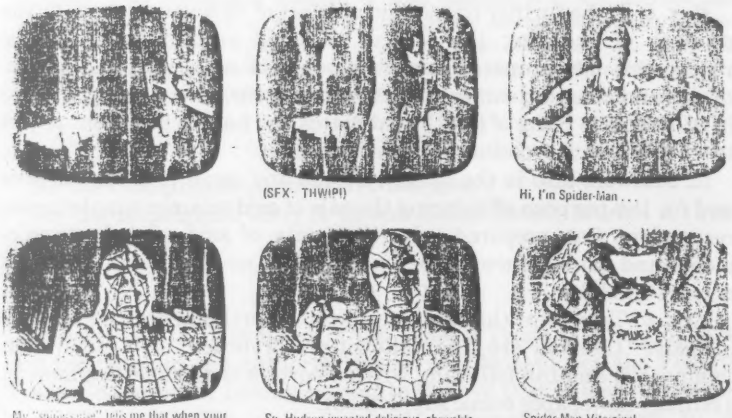
PAR. 4. In the further course and conduct of its business, respondent at all times mentioned herein has been and is now in substantial competition in commerce with individuals, firms and corporations in the sale and distribution of their respective products or services.

PAR. 5. In the further course and conduct of its business, and for the purpose of inducing the sale of the said vitamin supplements, respondent has prepared advertisements of said vitamin supplements and caused them to be broadcast by television stations located in at least one State of the United States and having sufficient power to transmit such broadcasts across state lines.

In addition, also in the further course and conduct of its business and for the purpose of inducing the sale of said vitamin supplements, respondent has prepared advertisements of said vitamin supplements and caused them to be published in newspapers distributed across state lines.

PAR. 6. Typical of the content of said advertisements, but not all-inclusive thereof, are the following storyboard of a television commercial and the following written portion of an advertisement in a Sunday newspaper comic supplement:

SPIDER-MAN VITAMINS BY HUDSON
Starting Fall 1975
30 Sec.


(SFX: THWIP!)
Hi, I'm Spider-Man . . .
My "spider-sense" tells me that when your children don't eat properly . . . they may need daily vitamins.
So, Hudson invented delicious, chewable
Spider-Man Vitamins!
New super-hero vitamins
kids won't forget to take!
"Spidersense" reminds them!
HUDSON VITAMINS
800-631-1145

TRY SPIDER-MAN VITAMINS FROM HUDSON®... AND I'LL SEND YOU A GIANT SPIDER-MAN POSTER!
Chewable Multiple Vitamins
TM
PARENTS'
Hudson, one of America's leading suppliers of quality vitamins—is proud to offer these super-quality SPIDER-MAN VITAMINS that provide 10 essential vitamins daily that children may need. They're chewable, with a delicious flavor kids say they like best! And you'll be glad to know they have the Parents' Magazine Guaranteed Seal. Now your kids won't forget their vitamins, folks—when they have SPIDER-MAN to remind them!
SPIDER-MAN VITAMINS...
the super-hero vitamins your kids WON'T forget to take!
50¢
WORTH 50¢ CASH WHEN YOU BUY 1 BOTTLE (60 OR 100 TABLETS) OF Hudson® SPIDER-MAN VITAMINS (REGULAR...OR WITH IRON)
50¢
50¢
50¢
For the Hudson drug store nearest you please call free! 800 648-4844
STORE COUPON

NEW SPIDER-MAN VITAMINS from Hudson® are now at these fine Drug stores

PAR. 7. Respondent's aforesaid advertising is directed to children. (For the purposes of this complaint "children" shall mean persons under twelve (12) years of age.) Children are unqualified by age or experience to decide for themselves whether or not they need or should use multiple vitamin supplements in general or an advertised brand in particular; thus the directing of advertising of multiple vitamin supplements to children is in itself an unfair practice.

PAR. 8. Respondent's aforesaid advertising utilizes the endorsements of a hero figure, Spider-Man, who is known for his superhuman strength and abilities and has a special appeal to children.

PAR. 9. The hero figure, Spider-Man, appears as the program character, "Spidey" on a popular children's television program, "The Electric Company."

PAR. 10. Respondent's aforesaid advertising is read or viewed by an audience a significant portion of which is composed of children.

PAR. 11. The use of a program character such as described in Paragraph Nine in television advertising viewed by an audience a significant portion of which is composed of children, has the tendency and capacity to blur for children the distinction between program content and advertising and to take advantage of the trust relationship developed between children and the program character.

PAR. 12. The use of such a hero figure as described in Paragraphs Eight, Nine and Eleven to endorse children's vitamin supplements in advertising read or viewed by such an audience as described in Paragraph Ten has the tendency and capacity to lead significant numbers of children to believe that the endorsed product has qualities and characteristics it does not have.

PAR. 13. Such advertising as described in Paragraphs Eight through Twelve has the tendency and capacity to induce children to take excessive amounts of vitamin supplements which may cause injury to their health.

Therefore, the acts or practices alleged in Paragraphs Five through Thirteen above are unfair or deceptive.

PAR. 14. The use by respondent of the said unfair or deceptive acts or practices has had and now has the tendency and capacity to induce a substantial portion of the purchasing public to purchase substantial quantities of the said vitamin supplements.

PAR. 15. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair or deceptive acts or practices and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Hudson Pharmaceutical Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal offices and place of business located at 21 Henderson Drive, Borough of West Caldwell, State of New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That Hudson Pharmaceutical Corporation and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, packaging, offering for sale, sale or distribution in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, of any vitamin supplement or

vitamin preparation designed primarily for use by children, do forthwith cease and desist from directly or indirectly disseminating, or causing the dissemination of, any advertisement for a vitamin supplement or vitamin preparation designed primarily for use by children where such advertisement is directed to c ildren.

II

For purposes of this order, the term "children" shall mean persons under twelve (12) years of age.

III

For purposes of this order, the term "advertisement directed to children" shall be limited to:

A. Any advertisement, irrespective of the age composition of its actual audience, whose dominant appeal is to a child audience, instead of an adult audience, broadcast over any television network or television station, or appearing in any print media;

B. Any advertisement appearing on any television program, broadcast over any television network or television station, more than fifty percent (50%) of the audience of which is composed of children; or in any spot announcement during any program break in, or during the program break immediately preceeding or following, any television program more than fifty percent (50%) of the audience of which is composed of children.

For the purposes of this order the determination of whether a television program had an audience more than 50 percent of which is composed of children, and thus falls within the provisions of this subpart of this order, shall be based on information as to the audience composition of television programs by age group contained in the reports of major audience rating services;

C. Any advertisement broadcast over any television network or television station from 6 a.m. to 9:05 p.m. local time where the advertisement utilizes a hero figure, including but not limited to "Spider-Man," which has a special appeal for children, and which directly or indirectly endorses, demonstrates, uses, or appears in conjunction with the product. A depiction of the product's container or package on which a hero figure appears is not considered use of a hero figure for purposes of this order so long as the depiction of the container or package is limited to less than one-third of the size of the screen;

D. Any advertisement appearing in a comic book where the printed matter is directed primarily to children;

E. Any advertisement appearing in print media where 50 percent or more of the trim area of the advertisement or of a page of the advertisement consists of the depiction of a hero figure which has a special appeal for children, including but not limited to "Spider-Man;"

F. Any advertisement where the advertisement states it is addressed to children; or

G. Any advertisement sent through the mail addressed to children, or whose addresses include the names of children, or whose content is not sealed within an envelope.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent corporation notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they complied with this order.

IN THE MATTER OF

BOISE CASCADE CORPORATION, ET AL.

Docket 8958. Interlocutory Order, Jan. 14, 1977

Commission declines to entertain motion for reconsideration by the full Commission of orders of Dec. 23, 1976, and Jan. 3, 1977, regarding extensions of time.

Appearances

For the Commission: *James C. Egan, Jr., Robert J. Enders* and *Roger L. Leifer.*

For the respondents: *Robert T. Johnson, Bell, Boyd, Lloyd, Haddad & Burns,* Chicago, Ill., *John K. Mallory, Jr., Cleary, Gottlieb, Steen & Hamilton,* Washington, D.C., *Frank Brewer,* Portland, Ore., *George J. Wade, Sherman & Sterling,* New York City, *Edwin S. Rockefeller, Bierbower & Rockefeller,* Washington, D.C., *Francis A. Kareken,* Tacoma, Wash., *Norman J. Wiener, Miller, Anderson, Nash, Yerke & Wiener,* Portland, Ore., *Edward T. Tate, Lee A. Rau* and *Joseph A. Rieser, Jr., Reed, Smith, Shaw & McClay,* Washington, D.C. and *Hammond E. Chaffetz, Kirkland & Ellis,* Chicago, Ill.

ORDER DENYING MOTION FOR RECONSIDERATION

On December 23, 1976, the Commission issued an order denying as unwarranted a motion filed by all respondents for a 60-day extension of time in which to file their appeal briefs from the initial decision and, instead, granting respondents 45 days after service of the initial decision in which to file. On January 3, 1977, the Commission rejected a separate request filed by respondent Willamette Industries, Inc., for a 60-day extension.

Respondent Willamette now moves that the Commission reconsider its January 3, 1977, order. Respondent renews and expands upon its claim that new counsel, retained to represent it on the appeal, require more time in which to familiarize themselves with the record.

It is determined that no reasons have been presented to warrant a modification of the original orders. Because this determination is properly issued in the name of the Commission pursuant to the delegation of functions published at 27 F. R. 481 (Jan. 17, 1962), the Commission declines to entertain the motion for reconsideration by the full Commission.

It is so ordered.

IN THE MATTER OF

INTERNATIONAL BUSINESS MACHINES CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket C-2864. Complaint, Jan. 18, 1977 — Decision, Jan. 18, 1977

Consent order requiring an Armonk, N.Y., marketer of data communications systems, equipment and services, among other things, to cease seating on its board of directors, individuals who simultaneously serve as directors of New York Telephone Company, American Telephone and Telegraph Company (AT&T), or any other competitive subsidiary of AT&T. Further, respondent is required to adopt and enforce certain prescribed procedures designed to detect and prevent future interlocking directorates.

Appearances

For the Commission: *Brian H. Siegel.*

For the respondent: *John W. Douglas, Covington & Burling,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated the provisions of Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the interest of the public, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent International Business Machines Corporation ("IBM") is a corporation organized and existing under and by virtue of the laws of the State of New York, maintaining its principal place of business at Armonk, New York. At all times relevant to this complaint, IBM had capital, surplus, and undivided profits aggregating in excess of $1,000,000. In 1975, IBM had revenues of approximately $14.4 billion.

PAR. 2. New York Telephone Company ("New York Telephone") is a corporation organized and existing under and by virtue of the laws of the State of New York, maintaining its principal place of business at New York, New York. At all times relevant to this complaint, New York Telephone had capital, surplus, and undivided profits aggregating in excess of $1,000,000. In 1974, New York Telephone had revenues of approximately $3.2 billion. New York Telephone is a 100 percent owned subsidiary of American Telephone & Telegraph Company ("AT&T").

PAR. 3. George L. Hinman is a resident of the State of New York. In 1963, he was elected to the board of directors of IBM. He was a director of IBM from the time of his election until his retirement (at age 70) on or about March 1976. In 1954, he was elected to the board of directors of New York Telephone. He was a director of New York Telephone from that time until his retirement (at age 70) on or about March, 1976. Mr. Hinman's retirement from the boards of directors of IBM and New York Telephone occurred after IBM and New York Telephone were informed that the Federal Trade Commission was conducting an investigation to determine whether the interlocking directorates between IBM and New York Telephone may be in violation of the laws prohibiting interlocks between competitors.

PAR. 4. Amory Houghton, Jr. is a resident of the State of New York. In 1966, he was elected to the board of directors of IBM. He has been a director of IBM from the time of his election up to and including the date of this complaint. In 1961, he was elected to the board of directors of New York Telephone. He was a director of New York Telephone from that time until his resignation on or about March 1976, after IBM and New York Telephone were informed that the Federal Trade Commission was conducting an investigation to determine whether the interlocking directorates between IBM and New York Telephone may be in violation of the laws prohibiting interlocks between competitors.

PAR. 5. (a) IBM is in the business of providing information handling systems, equipment, and services including data processing, data communications, and information management. IBM produces and markets the IBM 3270, a data communications terminal which may be used for information display.

(b) New York Telephone is engaged in the communications business involving a wide range of data communications activities. New York Telephone markets the Dataspeed 40 series, data communications terminals, which may be used for information display.

PAR. 6. IBM and New York Telephone are actual competitors of each other with respect to many products and services, including, but not limited to, data communications terminals which may be used for information display.

PAR. 7. (a) IBM and New York Telephone are by virtue of their business and location of operation, competitors of each other.

(b) The elimination of competition by agreement between IBM and New York Telephone would hinder, foreclose, and restrain competition, or tend to create a monopoly, in or affecting commerce, in the sale or lease of data communications equipment or services pertain-

ing to data communications as a whole or with respect to specific products or services supplied by IBM and New York Telephone.

PAR. 8. (a) The products and services referred to in Paragraph Five are sold and distributed by IBM and New York Telephone in substantial amounts from locations in various States of the United States to customers located in many other States of the United States.

(b) IBM and New York Telephone each engage in commerce as that term is defined in the Clayton Act and in the Federal Trade Commission Act.

PAR. 9. The foregoing acts and practices of respondent, as alleged and set forth, constitute violations of Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing a consent order having thereupon been placed on the public record for a period of sixty (60) days, and now in conformity with the procedure provided by Section 2.34 of its Rules, the Commission hereby issues its decision in disposition of the proceeding against the above-named respondent, makes the following jurisdictional findings, and enters the following order:

1. Respondent International Business Machines Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive offices located at Old Orchard Road, Armonk, New York.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That the following definitions shall apply in this order:

"Subsidiary" of a corporation or company means any partnership, firm, association, corporation, or other legal or business entity, 50 percent or more of the voting stock of which is owned or controlled, directly or indirectly, by such corporation or company.

"Sister" corporations or companies means two or more corporations or companies which are "subsidiaries" of a common "parent."

"Product or service manufactured, produced, sold, or leased in competition with IBM" (or words to similar effect) includes, but is not restricted to, any product or service which is classified within the same four-digit category as any IBM product or service, as such four-digit categories ("SIC Codes") are defined in the Codes and Product Descriptions published by the U.S. Bureau of the Census in its latest Numerical List of Manufactured Products. "Product or service * * * leased in competition with any product or service leased by IBM" shall not include any transaction solely designed to create a security interest for a lender, for instance, where a bank, as an incidental part of its normal long-term financing business, buys equipment selected by its customer and then leases such equipment back to the customer on a long-term basis.

II

It is further ordered, That for purposes of this order, a corporation or company, including International Business Machines ("IBM"), and any corporation which shares a common director with IBM, shall be deemed to be engaged in the manufacture, production, sale, or lease, of a product or service, if any parent, subsidiary, or sister of such corporation or company is so engaged.

III

It is further ordered, That IBM, its successors and assigns, do forthwith cease and desist from permitting any individual to serve on its board of directors if such individual is or would be at the same time a director of New York Telephone Company ("New York

Telephone"), American Telephone & Telegraph Company ("AT&T"), or any subsidiary of AT&T, so long as IBM and either New York Telephone, AT&T, or any subsidiary of AT&T compete in the manufacture, production, sale, or lease of any product or service by virtue of their businesses and locations of operation.

IV

It is further ordered, That respondent IBM shall adopt and enforce the following compliance program to prevent illegal interlocks:

(a) On October 1st of each year for a period of five years, commencing October 1, 1976 or as soon as reasonably possible after final Commission acceptance of this order (but no later than 45 days after service upon IBM of this order, as finally accepted by the Commission), IBM shall certify in writing to the Commission that no director of IBM, nor any nominee for director of IBM, serves or is then a nominee for a position on the board of directors of a company which manufactures, produces, sells, or leases, any product or service in competition with any product or service manufactured, produced, sold, or leased by IBM where:

(1) That company manufactures, produces, sells, or leases the competitive products and services in an aggregate amount in excess of either one-half of one percent (.5%) of that company's most recent annual gross revenues or $5,000,000, whichever is the lesser; and

(2) IBM manufactures, produces, sells, or leases such competitive products and services in an aggregate amount in excess of either one-half of one percent (.5%) of IBM's most recent annual gross revenues or $10,000,000, whichever is the lesser.

(b) Prior to and as the basis for making the certification required in Paragraph IV(a) hereto, IBM shall do the following:

(1) IBM shall require a written certification to IBM from each IBM director and each nominee for director, identifying each other company on which said director or nominee serves or is then a nominee to serve as a member of such other company's board of directors. When requesting such certification IBM shall furnish each director and nominee for director a copy of the complaint and order in this proceeding.

(2) IBM shall determine the products and services manufactured, produced, sold, or leased by each company listed in the certification referred to in Paragraph IV(b)(1), shall identify the four-digit SIC Codes which encompass such products and services to the extent enumerated in Paragraph (i) below, and shall determine whether such products and services are competitive with IBM's products and services, by:

(i) Reviewing Moody's reports, Standard & Poor's reports, and such other standard reference work, report, or periodical concerning the data processing business and other businesses engaged in by IBM, as may be appropriate;

(ii) reviewing the most recent annual report of each company listed by each IBM director or nominee and the most recent 10K report (and any other more recent report) filed with the Securities and Exchange Commission by each such company;

(iii) taking any and all other action necessary to determine with reasonable diligence where the products and services of IBM are in competition with the products and services of such other company, including but not limited to:

(a) Consulting with appropriate personnel in IBM's manufacturing, marketing, and other divisions most knowledgeable regarding the source and nature of products and services in competition with the products and services of IBM and the corporate affiliations of the companies offering such products and services; and

(b) reviewing press releases and trade publications to detect possible areas of competitive overlap between IBM and each company listed by each IBM director or nominee.

(c) In the event that the process of review required by Paragraph IV(b) hereof discloses the existence of any competition between IBM and any other company as defined in Paragraph IV(a) hereof, IBM shall not permit the service on its board of directors of any person who remains a director or nominee for director of that company. IBM shall be allowed a reasonable period of time, but in no event longer than ninety days from the date of such disclosure, within which to take any legal or other steps necessary to secure compliance, including requiring any IBM director serving on such other company's board to resign from IBM's board or such other company's board forthwith or, in the case of a nominee, to forthwith remove his name from nomination. *Provided, however,* that notwithstanding the fact that a product or service of IBM shall be included in the same four-digit SIC Code as any product or service of such other company, the provisions of this Paragraph IV(c) shall not apply if, in its certification pursuant to Paragraph IV(a) hereof, IBM demonstrates that such other company's products or services are not in competition with the products or services of IBM. If IBM fails to so demonstrate after notice and a reasonable opportunity (not to exceed thirty (30) days from the date of such notice) to discuss the matter further with the staff of the Commission, then, upon notification by the staff, IBM shall be allowed a reasonable period of time, but in no event longer than sixty (60) days from the date of such notification within which to

dissolve the interlocking directorate. Notwithstanding the foregoing sentence, IBM shall not be entitled to a formal hearing and decision by the Commission on the question of whether or not such products or services falling within the same four-digit SIC Code are in competition.

(d) IBM's certification to the Commission, which is to be made on an annual basis as described in Paragraph IV(a) hereof, shall contain the written certifications of the individual directors and nominees required by Paragraph IV(b)(1) hereof and a copy of IBM's written request to such directors and nominees, shall set forth in detail the manner and form in which IBM has complied with this order, and shall include a detailed description of actions taken by IBM pursuant to Paragraphs IV(b)(2) and IV(c) hereof.

V

It is further ordered, That the provisions of Paragraph IV hereof shall not apply where:

(a) The other corporation on whose board of directors such nominee or director also serves controls 50 percent or more of the voting stock of IBM ("parent");

(b) IBM controls, directly or indirectly through subsidiaries, 50 percent or more of the voting stock of the other corporation on whose board of directors such nominee or director also serves ("subsidiary"); or

(c) 50 percent or more of the voting stock of the other corporation on whose board of directors such nominee or director also serves is held by a corporation which also holds 50 percent or more of the voting stock of IBM ("sister").

VI

It is further ordered, That nothing in this order shall be construed to exempt IBM from full compliance with the antitrust laws or the Federal Trade Commission Act; that the fact that any activity is not prohibited by this order shall not bar a challenge to it under such statutes; and that the fact that a particular interlock may not be subject to the provisions of Paragraph IV hereof does not immunize that interlock from challenge under such statutes.

VII

It is further ordered, That IBM shall notify the Commission at least thirty days prior to any proposed corporate change, such as dissolution, assignment, sale, or reorganization resulting in the emergence

of a successor corporation, the creation or dissolution of subsidiaries, or any other change which may affect compliance obligations arising out of this order.

IN THE MATTER OF

PARAMEDICAL SERVICES, INC. T/A PACIFIC INTERNATIONAL, LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2863. Complaint, Jan. 24, 1977 — Decision, Jan. 24, 1977

Consent order requiring a Wayne, Pa., distributor of a treatment method for nocturnal enuresis, and its Menlo Park, Calif., franchisee, among other things, to cease misrepresenting that the mechanical device used in their treatment method is unique. Further, respondents are required, three days before their contracts become binding, to give customers a written disclosure that the device is similar to those sold or rented by others.

Appearances

For the Commission: *Harold G. Sodergren.*

For the respondents: *William J. McLean, Thoits, Lehman, Hanna & Love,* Palo Alto, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Paramedical Services, Inc., a corporation doing business as Pacific International, Ltd., and C.R.O., Ltd., a corporation, doing business as Pacific International—CRO, Ltd., and Robert C. Stearns, individually and as an officer of C.R.O., Ltd., hereinafter referred to as "respondents," have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Paramedical Services, Inc. is a Delaware corporation, with its principal office at 224 County Line Road, Wayne, Pennsylvania.

Respondent C.R.O., Ltd. is an Oregon corporation with its principal office at 3210 Alpine Road, Menlo Park, California. It is now, and for some time last past has been a franchisee of respondent Paramedical Services, Inc.

Respondent Robert C. Stearns is an individual and an officer of C.R.O., Ltd. and was formerly general manager of respondent Paramedical Services, Inc. In such positions, respondent Stearns formulated, directed, and controlled the acts and practices of the

corporate respondents, including the acts and practices herein set forth, and now formulates, directs, and controls the acts and practices of C.R.O., Ltd., including the acts and practices hereinafter set forth. The address of respondent Stearns is the same as that of C.R.O., Ltd.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale, sale and distribution of a treatment method for nocturnal enuresis, or "bedwetting" (hereinafter referred to as "enuresis").

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, the dissemination of certain advertisements concerning said treatment method by various means in and affecting commerce, including but not limited to newspaper, periodical and direct mail advertisements; have caused its device and program to be shipped from their places of business or sources of supply to their distributors, and to consumers, located in various States of the United States other than the state of origination; and have transmitted and received and caused to be transmitted and received, in the course of selling, delivering, soliciting advice, advising, and obtaining return of, their device and program, among and between the several States of the United States, contracts, invoices, letters, records, checks, and various other kinds of commercial paper and documents. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in such device and program in and affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of their business, respondents have entered into oral or written distributor agreements with various firms and individuals (hereinafter referred to as "distributors") whereby such distributors agree to sell said program, directly or through representatives they engage, to consumers. Respondents have possessed, and now possess, the inherent authority to control the acts, practices and policies of its distributors, and/or do control, encourage, facilitate, implement and furnish the means, instrumentalities, services and facilities for, and condone, approve and accept the pecuniary and other benefits flowing from, the acts, practices and policies herein set forth, of said distributors, and respondents are therefore responsible for the acts and practices of said distributors (acts and practices of "distributors" include the acts and practices of dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors or other representatives engaged by said distributors).

PAR. 5. Respondents and their distributors, for the purpose of inducing the purchase of respondents' treatment method, advertise

in magazines and newspapers which have substantial circulation to parents with young children, in order to solicit such parents to mail their names and addresses to respondents and their distributors to learn more about respondents' treatment method. The names and addresses of parents who respond to such advertisements are ordinarily sold or given by respondents to their distributors, and/or utilized by their distributors in contacting such parents and arranging for a sales presentation in the home of the consumer, during which they make additional statements and representations regarding respondents' treatment method. Respondents' and their distributors' representations to consumers are general and vague regarding the precise nature of their treatment method. Respondents' treatment method for nocturnal enuresis consists of: (1) a mechanical device of a type generally available at retail to consumers, which is designed to awaken the enuretic by sounding an alarm at the time bedwetting occurs; and (2) a training and consulting service to assist the consumer in utilizing the device to treat the enuretic. The training and consulting service is sold by respondents to consumers, together with the loan of the mechanical device, at a price of $450-$625. Essentially similar mechanical devices are sold or rented at retail for $20-$40.

PAR. 6. Typical of statements and representations made by respondents and their distributors regarding their treatment method are the following:

> * * * Only one company, Pacific International, Ltd. ever made a serious and in-depth study of this sleep and over a period of many years perfected a procedure whereby they could teach a person to sleep in a normal way* * *.
> The Pacific International, Ltd. process is unique and controlled. They recognize that parents are not expert in analyzing the sleep patterns of their child and so are relatively helpless in attempting to assist their bedwetter* * *.

(Composite of opinions of "three eminent physicians" from p. 5 of pamphlet entitled BEDWETTING, WHAT ITS ALL ABOUT AND HOW TO END IT)

* * * * * * *

> (Respondent) Stearns: Do you think our method of handling the problem is sound?
> Jorge McGuinness, M.D.: Its the only one I know of that is really successful and makes any sense* * *. You treat the cause and you're the only one who does* * *. You've succeeded where everyone else has failed* * *

(Excerpt from film disseminated by respondents and shown by distributors to prospective customers.)

* * * * * * *

C (Salesman): Have you ever used any kind of a waking device? Now, this is a pad about that long, like that, and it goes in the bed, and it sets off an alarm or something like that. Have you ever heard of anything like that?
G (Father of Enuretic Child): Yes, a neighbor told me about one.
C: You haven't used anything like that?
Mrs. G (Mother of Enuretic Child): I thought that's what you folks have.
C: No, Mrs. Grant, we do not rely on any kind of a waking device. Now, we have a moisture-sensing device that we use in connection with our program. To gather information for our report cards, and you'll learn more about that on the film later on.

(Excerpt from respondents' authorized sales manual, p. 61.)

PAR. 7. By and through the use of the representations set forth in Paragraph Six, respondents and their distributors have represented and are representing that their mechanical device is unlike other mechanical devices utilized in treatment for enuresis.

PAR. 8. In truth and in fact, respondents' mechanical device is like other mechanical devices utilized in treatment for enuresis.

Therefore, said representations were and are, unfair, false, misleading and deceptive.

PAR. 9. The acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public, and constituted, and now constitute, unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and

having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Paramedical Services, Inc. is a Delaware corporation, with its principal office at 224 County Line Road, Wayne, Pennsylvania.

Respondent C.R.O., Ltd. is an Oregon corporation with its principal office at 3210 Alpine Road, Menlo Park, California. It is now, and for some time last past has been a franchisee of respondent Paramedical Services, Inc.

Respondent Robert C. Stearns is an individual and an officer of C.R.O., Ltd. and was formerly general manager of respondent Paramedical Services, Inc. In such positions, respondent Stearns formulated, directed, and controlled the acts and practices of the corporate respondents, including the acts and practices herein set forth, and now formulates, directs, and controls the acts and practices of C.R.O., Ltd., including the acts and practices hereinafter set forth. The address of respondent Stearns is the same as that of C.R.O., Ltd.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Paramedical Services, Inc., and C.R.O., Ltd., corporations, their successors and assigns, and their officers, and Robert C. Stearns, individually and as an officer of said C.R.O., Ltd., and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, or through their "distributors" as hereinafter defined, in connection with the advertising, offering for sale or rental, contracting, sale or rental, or other promotion of any device or service for the cure, mitigation or treatment of nocturnal enuresis in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Representing directly or by implication that the mechanical device utilized by respondents is unlike all other mechanical devices utilized in treatment for nocturnal enuresis.

2. Failing to disclose the following *verbatim* to all persons

executing any agreement or other binding obligation to pay money or other consideration to respondents or respondents' distributors, or paying any money or other consideration to respondents or respondents' distributors:

> Our treatment method for nocturnal enuresis consists of: (1) a mechanical device of a type similar to those sold or rented elsewhere, which is designed to awaken the enuretic by sounding an alarm at the time bedwetting occurs; and (2) a training and consulting service to assist you in utilizing the device to treat the enuretic.

Said disclosure shall be furnished in a single disclosure statement in no less than 10 point bold type, which shall not contain any promotional claims or other information not required by this order, at least three (3) business days prior to either the execution by any consumer of any agreement or any other binding obligation to pay money or other consideration to respondents or respondents' distributors, or the payment by such person of money or other consideration to respondents or respondents' distributors, whichever occurs first. Respondents shall retain for two years dated and signed acknowledgements (or return receipts for mailed disclosures) of receipt by consumers of said disclosure statement. *Provided however,* that said disclosure statement may be furnished at the time of the execution of an agreement with a consumer, where said agreement contains a three-day cooling-off period provision in compliance with the Federal Trade Commission's Trade Regulation Rule Regarding Cooling-Off Period for Door-to-Door Sales, 16 C F R 429.

It is further ordered, That respondents:

1. Deliver, or cause to be delivered, a copy of this order to each distributor. A "distributor," as that term is used throughout this order, is defined as: Any present or future dealer, franchisee, licensee, employee, salesman, agent, solicitor, independent contractor or other representative, who purchases from, or receives commissions or other income on purchases from, respondents.

2. Inform all distributors that the respondents are obligated by this order to discontinue dealing with those distributors who fail to comply with this order, under the circumstances set forth in subparagraph 4 of this paragraph.

3. Institute a program of continuing surveillance to reveal whether the business operations of each of said distributors conform to the requirements of this order.

4. Upon receiving actual knowledge from any source (including but not limited to respondents' program of surveillance, and representatives of the Federal Trade Commission) of facts indicating a violation of any provision of this order by any distributor, or by any of

such distributor's present and future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors, or other representatives, respondents shall within 24 hours notify such distributor by certified mail, return receipt requested, that such violation of this order has occurred ("Notice"), and that respondents will discontinue dealing with said distributor upon receipt by respondents of actual knowledge of two (2) or more further violations of this order by such distributor, or by any of such distributor's present and future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors or other representatives, within one-hundred and eighty (180) days of receipt of said Notice by such distributor. Respondents shall obtain from such distributor written acknowledgement of receipt of such Notice, which acknowledgement shall indicate the date of receipt of such Notice.

Upon receiving actual knowledge from any source (including but not limited to respondents' program of surveillance, and representatives of the Federal Trade Commission) of facts indicating two (2) or more violations of any provision of this order, within one-hundred and eighty (180) days following a distributor's receipt of the aforesaid "Notice," by a distributor, or by any of such distributor's present or future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors or other representatives, respondents shall permanently discontinue dealing with such distributor.

Provided however, that for purposes of any compliance proceeding that may be instituted as to this order, respondents shall not be responsible for a violation of any provision of this order by a distributor or a distributor's present or future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors or other representatives, except insofar as respondents fail to terminate said distributor as required by subparagraph 4 of this paragraph.

5. Maintain complete records for a period of no less than three years from the date of the incident, of any written or oral information received which indicates the possibility of a violation of this order by any respondent or distributor, or any of such distributor's present and future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors, or other representatives; and maintain complete records of notifications of violations as required by subparagraph 4 of this paragraph, and of distributors' acknowledgements of receipt of such notifications. Any oral information received indicating the possibility of a violation of this order shall be reduced to writing, and shall include the name, address and telephone number of the informant, the name and address of the

distributor involved, the date of the communication, and a brief summary of the information received. Such records shall be available upon request to representatives of the Federal Trade Commission, at normal business hours upon reasonable advance notice.

It is further ordered, That the corporate respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in said corporations which may affect compliance obligations arising out of the order.

It is further ordered, That respondents forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include such respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Chairman Collier voted against acceptance on the ground that the order is ineffective and the matter is not of sufficient importance to warrant the further expenditure of public funds.

IN THE MATTER OF

EXXON CORPORATION, ET AL.

Docket 8934. Interlocutory Order, Jan. 31, 1977

With certain provisos Commission adopts paragraph nine of ALJ's Jan. 5, 1977, protective order.

*Appearances**

ORDER

The administrative law judge has certified to the Commission paragraph nine of his January 5, 1977, protective order. The certification requests that the Commission approve and adopt the order provision or take such other action as it may deem appropriate. The Commission has determined to adopt paragraph nine subject to the following provisos: 1) with respect to documents only portions of which have been designated as "confidential" pursuant to the protective order, the Commission's assurance of prior notification will extend only to those portions; 2) in the case of release of a document, or portion of a document, designated as "confidential," in response to an official request from a committee or subcommittee of Congress or to a court in response to compulsory process, the Congressional committee or subcommittee or the court will be advised that the party which supplied the document considers the material to be confidential and the party will be provided ten days' prior notice where possible, and in any event as much advance notice as can reasonably be given.

It is so ordered.

* For reasons of economy, the *Appearances* are not being reproduced herein. Information regarding *Appearances* may be obtained from the Public Reference Branch, Federal Trade Commission, Washington, D.C.

IN THE MATTER OF

CENTURY 21 COMMODORE PLAZA, INC., ET AL.

Docket 9088. Interlocutory Order, Feb. 1, 1977

Commission affirms ALJ's ruling that he has authority to issue an access order.

Appearances

For the Commission: *Sandra M. Wilmore, June S. Katz, Donna H. Greenfield, W. Randolph Smith* and *Anne E. Dewey.*

For the respondents: *G. F. Richman, Frates, Floyd, Pearson, Stewart, Richman & Greer,* Miami, Fla.; *W. L. Miller, Stein, Halpert & Miller,* Washington, D.C.; *Jerome S. Richman,* Miami, Fla.; *Joel Bennett,* Washington D.C.; and *Joseph S. Paglino,* Intervenor for Commodore Plaza, Miami, Fla.

ORDER

Respondents have applied for review of the administrative law judge's order of December 28, 1976, granting complaint counsel's motion for an order compelling the granting of access to Morgan's Bay, a body of water contiguous to the beach area leased to owners at respondents' condominium project. Pursuant to Section 3.23(b) of the Commission's Rules of Practice, the ALJ determined that his ruling that he has authority to issue an access order was appropriate for immediate review. Confining ourselves to the question of the law judge's authority to issue such an order, we affirm.[1]

We would add to the law judge's treatment of the issues that respondents' application does not challenge the Commission's statutory authority to issue such an order. Sections 6(a) and 6(g) of the Federal Trade Commission Act authorize the Commission "[t]o gather and compile information concerning, and to investigate from time to time the * * * business, conduct, [and] practices * * * of any corporation engaged in or whose business affects commerce * * *" and "to make rules and regulations for the purpose of carrying out the provisions" of the FTC Act. The latter provision is to be construed in a manner that will "render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment, particularly where * * * that interpretation is consistent with the plain language of the statute." *National Petroleum Refiners Ass'n* v.

[1] We, therefore, have not considered respondents' various arguments going to the relevancy of the requested discovery or their suggestion that an access order would be unlawful because a portion of the lake bottom is owned by other private parties.

FTC, 482 F.2d 672, 689 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 951 (1974). Orders requiring access to tangible, as well as documentary, evidence are well-established. *See* Fed. R. Civ. P. 34. We, therefore, can discern no reason why the language of Sections 6(a) and 6(g) is not sufficiently broad to authorize such relief, provided that "the inquiry is within the authority of the agency, the demand is not too indefinite and the information is reasonably relevant." *United States* v. *Morton Salt Co.,* 338 U.S. 632, 652 (1950). Accordingly,

It is ordered, That the aforesaid ruling of the administrative law judge that he has authority to issue an access order be, and it hereby is, affirmed.

IN THE MATTER OF

EVERSEAL WATERPROOFING CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT.

Docket C-2865. Complaint, Feb. 4, 1977 — Decision, Feb. 4, 1977

Consent order requiring a Newton, Mass., seller and distributor of waterproofing products and services, and its subsidiaries, among other things, to cease misrepresenting their guarantees; the nature, efficacy, and performance characteristics of their products; and the size and volume of their business. Further, the order requires respondents to maintain specified records; make prescribed disclosures; and respond to requests for service within seven days. Additionally, respondents must provide a three-day cooling-off period during which customers may cancel transactions and receive prompt refunds; maintain a responsible customer relations department; and institute a surveillance program designed to ensure compliance with the order.

Appearances

For the Commission: *William F. Connolly* and *Lois M. Woocher.*

For the respondents: *Harry J. Greenblatt, Kaplan & Arnoldy,* Boston, Mass.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Everseal Waterproofing Corporation, a corporation, Everseal Waterproofing of New Hampshire, Inc., a corporation, Everseal Corporation of Maine, a corporation, and Irving Silverstein, individually, and William A. Epner, individually and as an officer of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Everseal Waterproofing Corporation, hereinafter referred to as Everseal, is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its principal office and place of business located at 958 Watertown St., Newton, Massachusetts.

Respondent Everseal Waterproofing of New Hampshire, Inc., hereinafter referred to as Everseal of New Hampshire, is a corporation organized, existing and doing business under and by virtue of the

laws of the State of New Hampshire with its principal office and place of business located at 9 Capitol St., Concord, New Hampshire.

Respondent Everseal Corporation of Maine, hereinafter referred to as Everseal of Maine, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maine with its principal office and place of business located at 57 Exchange St., Portland, Maine.

Respondent Irving Silverstein is a former officer, director and stockholder of each of the corporate respondents. He has formulated, directed and controlled the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. His address is 42 Sierra Road, Hyde Park, Massachusetts.

Respondent William A. Epner is an officer, director and sole stockholder of each of the corporate respondents. He formulates, directs and controls the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. His address is the same as that of corporate respondent, Everseal Waterproofing Corporation.

PAR. 2. Respondents are now, and for some time last past have been engaged in advertising, offering for sale, sale and distribution of residential and commercial waterproofing products and services to the public.

Respondents place into operation and implement a sales program whereby members of the general public, by means of advertisements placed in printed media of general circulation and by means of brochures, pamphlets and other promotional literature disseminated through the United States mail or by other means, and through the use of sales personnel and by means of statements, representations, acts and practices as hereinafter set forth, are induced to sign agreements (contracts) for the purchase of respondents' waterproofing products and services.

Respondents receive substantial income from the results of such agreements.

PAR. 3. In the course and conduct of their business, as aforesaid, respondents now cause and for some time last past have caused their advertising and promotional material and their said products, sales contracts, invoices, billing statements, checks, monies and other business papers and documents, to be shipped and transmitted to, from and between their several places of business located as aforesaid, and to prospective purchasers thereof located in various other States of the United States, other than the state of origination, and maintain, and at all times mentioned herein have maintained a substantial course of trade in said products and services in and

affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid, for the purpose of obtaining leads or prospects for the sale of residential and commercial waterproofing products and services, and for the purpose of inducing the purchase of their products and services, respondents and their employees, salesmen and representatives, cause prospective purchasers of their waterproofing products and services who have answered respondents' advertisements to be interviewed by salesmen at the place of residence of individual prospective purchasers. Said salesmen endeavor to sell respondents' waterproofing products and services and for the purpose of inducing the sale of said products and services, said salesmen make many statements and representations, directly or by implication, both orally and by means of brochures or other printed material displayed by the salesmen to prospective purchasers. In conjunction therewith, respondents have made certain statements concerning the nature of their offer and their business, the efficacy, value, price, worth and performance of the waterproofing products and services and the guarantee offered by respondents. Typical and illustrative, but not all inclusive of said statements and representations relating to respondents' products and services are the following:

A. Newspaper Advertisements

US Gov't. Pat. #2,277,286.

Basements Waterproofed Efficiently,
Inexpensively.

Over 100,000 Basements Throughout the Country
Have Been Successfully Sealed Against Water
Seepage By This Process.

No Problem Too Small or Too Large.

You Hold 25% of Total Price for 1 Year To
Guarantee That We Have Successfully Sealed
Your Basement.

For Free Estimates Call or Write
Everseal Waterproofing Corp.
340 Main Street, Worcester, MA 791-0800
In Boston 969-7800
Lowell 459-7300
Manchester, NH 625-9777
Providence, RI 421-4222
Portland, ME 77-1000.

No Digging. All Work Done From the Outside.

No Damage to Lawns, Shrubs, Walks.

Learn About the Danger Signs of Water Seepage.
Send for Free Everseal Booklet Today.

B. Radio Advertisements

The Everseal method has been used in over 100,000 basements throughout the country, and it's available to you right here and now.

You hold 25% of the toal price for 1 year, to guarantee that Everseal has successfully sealed your foundation.

The Everseal process is the most economical and reliable answer for all basement waterproofing problems.

Homeowners * * * Do you have a wet or damp basement? Everseal Waterproofing can solve your problem efficiently and inexpensively.

The Everseal method seals from the outside and there's no damage to lawns, shrubs, walks or driveways.

C. Statements in Brochures and Pamphlets

US Gov't. Pat. #2,277,286.

The most economical and reliable answer for all basement waterproofing problems.

It has also been used in major structures, such as the Coffer Dam across the Columbia River during construction of the Grand Coulee Dam.

Pressure pumping is a method of applying bentonite . . . which forms a perfect seal on EXTERIOR WALLS without excavation and seals the cracks in masonry, concrete brick, or concrete block by following the crack through the wall, thus forming a complete closure against moisture and water.

* * * forming a perfect seal between the foundation and the fill repelling all water seepage attempting to enter the basement.

* * * effectively sealing walls against seepage, dampness, sweating, and surface water.

Bentonite, pumped under pressure, not only seals the outside and inside walls (at the cracks) but also impregnates outside soil to a width of twelve inches from basement walls, thus forming a zone of protection,

effectively sealing off water.

This material will not evaporate, wash off, or deteriorate through age, or soil condition. It makes a guaranteed waterproofing job.

You hold 25% of total price for 1 year, to guarantee that we have successfully sealed your foundation.

5 year written Everseal guarantee.

D. Oral Statements by Sales Representatives

The Everseal process will definitely solve your problem. You won't have even a drop of water.

The Bentonite is pressure pumped into the ground, pushes the water out of the ground and the walls, and hardens, filling cracks and preventing water from seeping in.

We have done many jobs in this area and successfully solved even the most difficult basement water problems.

Once we pour this stuff in, you'll never have any more problems.

The work is absolutely guaranteed to eliminate your basement water problem.

All work is done from the outside.

The pumping will take from 2 to 3 days to complete.

I'm giving you a 25% discount from our regular price for paying in full.

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import and meaning, but not expressly set out herein, separately and in connection with the oral statements and representations of salesmen and representatives, the respondents have represented, and are now representing, directly or by implication that:

1. Respondents' method of basement waterproofing is an exclusive, patented process.

2. Respondents' waterproofing process will seal all types of walls, floors, and foundations against water seepage.

3. Respondents' method of basement waterproofing will stop basement water damage completely and will keep basements dry permanently.

4. Respondents' waterproofing services are unconditionally guaranteed in writing and respondents' customers may hold 25 percent of the total price for one year to guarantee that respondents have successfully sealed the customers' basements.

5. Respondents have branch offices with complete sales and service facilities in several New England States.

6. Respondents' basement waterproofing process, which is applied from the outside, waterproofs basements without digging and without causing damage to shrubs, walks or driveways.

7. Respondents' waterproofing process has satisfactorily sealed over 100,000 basements against water seepage.

8. The waterproofing material (bentonite) used by respondents in their basement waterproofing services is not affected by soil conditions and the water table level.

9. The efficacy of bentonite as a waterproofing agent in the pressure pumping process is demonstrated by the successful use of bentonite as a waterproofing agent in the construction of dams, levees, and other major structures.

10. Respondents' waterproofing services are being offered for sale at special or reduced prices and purchasers are thereby being offered savings from respondents' regular selling price.

11. Respondents will provide prompt service when requested following completion of any waterproofing work.

PAR. 6. In truth and in fact:

1. Respondents' method of basement waterproofing is not exclusive or unique but has been and is utilized by other competing basement waterproofing companies.

2. Respondents' waterproofing process will not seal all types of basement walls, floors, and foundations against water seepage.

3. Respondents' method of basement waterproofing will not stop basement water damage completely and will not keep basements dry permanently.

4. Respondents' waterproofing services are not unconditionally guaranteed in writing but are subject to numerous conditions and limitations. Such conditions and limitations include: the contractual provision that respondents at their discretion may perform and charge for additional waterproofing services; respondents' offer of the 25 percent holdback provision is available only to selected customers; and respondents do not provide service to dissatisfied customers who hold back 25 percent of the total price.

5. Respondents do not maintain branch offices with complete sales and service facilities in several New England States.

6. Respondents' basement waterproofing process does not water-

proof basements from the outside without digging and without causing damage to shrubs, walks, or driveways. Respondents, in many cases, have done extensive digging and patching along the interior and exterior basement walls of the homes of their customers; respondents, in many cases, have dug or drilled holes into walks and driveways adjacent to the basement foundations of the homes of their customers.

7. Respondents' waterproofing process has not satisfactorily sealed over 100,000 basements against water seepage.

8. The waterproofing material (bentonite) used by respondents in their basement waterproofing services is affected by soil conditions and the water table level. In those instances where the soil is not sufficiently porous or where the water table level is not sufficiently low, the bentonite mixture will not act as an effective sealant.

9. The efficacy of bentonite as a waterproofing agent in the pressure pumping process is not demonstrated by the successful use of bentonite as a waterproofing agent in the construction of dams, levees, and other major structures.

10. Respondents' services are not offered for sale at special or reduced prices, and savings are not thereby afforded respondents' purchasers because of reductions from respondents' regular selling prices. In fact, respondents do not have a regular selling price and the prices at which respondents' products are sold vary from customer to customer, depending on the resistance of the prospective purchaser.

11. Respondents do not provide prompt service to their customers following completion of any waterproofing work, but, in many instances, respondents' customers wait for weeks or months before any such service is rendered.

PAR. 7. Through the use of their advertisements, brochures, pamphlets and oral representations, respondents and their employees, salesmen and representatives, have represented, directly or by implication, that:

1. Respondents' method of basement waterproofing will seal all types of basement walls, floors, and foundations against water seepage completely and permanently.

2. The waterproofing material (bentonite) used by the respondents is not affected by soil conditions or the water table level.

3. At the time respondents made the representations set forth in sections (1) and (2) of this paragraph, they had a reasonable basis from which to conclude that their basement waterproofing method will seal all types of basement walls, floors and foundations against water seepage completely and permanently and that the waterproof-

ing material (bentonite) used by the respondents is not affected by soil conditions and the water table level.

PAR. 8. In truth and in fact, during the time the representations set forth in sections (1) and (2) of Paragraph Seven were made, respondents had no reasonable basis from which to conclude that their method of basement waterproofing will seal all types of basement walls, floors, and foundations against water seepage completely and permanently and that the waterproofing material (bentonite) used by respondents is not affected by soil conditions or the water table level.

Therefore, the statements and representations as set forth in Paragraphs Four and Seven, were and are, false, misleading and deceptive.

PAR. 9. Furthermore, the making of the representations that respondents' waterproofing process will seal all types of basement walls, floors and foundations against water seepage completely and permanently and that the waterproofing material (bentonite) used by respondents is not affected by soil conditions and the water table level without a reasonable basis for making such representations, is, in itself, an unfair act or practice in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 10. In the further course and conduct of their business and in the furtherance of their purpose of inducing prospective customers to execute contracts for basement waterproofing products and services, respondents and their employees, salesmen, and representatives, have represented in their advertisements, brochures and in oral representations made by sales representatives, that the respondents' pressure pumping process sold to their customers at specified selling prices will waterproof their customers' basements completely and permanently with no need for additional services or products by respondents at additional cost to the customer. Respondents thereby have falsely and deceptively represented that the total selling price set forth in the contract constitutes the total outlay of money necessary to accomplish the waterproofing of customers' basements without disclosing that there is a specific likelihood that additional products and services by way of installation of a pressure relief floor system may be subsequently required at substantial additional cost to the customer in order to completely and permanently waterproof the basements of such customers.

Therefore, respondents' statements, representations, acts and practices, and nondisclosures of material facts, as set forth herein, were and are, false, misleading, unfair or deceptive acts or practices.

PAR. 11. In the further course and conduct of their business and in

the furtherance of their purpose of inducing prospective customers to execute contracts for their waterproofing products and services, respondents and their employees, salesmen and representatives, have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

In a substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Ten above, respondents have been able to induce customers into signing a contract upon initial contact without giving the customers sufficient time to carefully consider the purchase and the consequences thereof.

PAR. 12. By and through the use of the aforesaid acts and practices, respondents place in the hands of others the means and instrumentalities by and through which they may mislead and deceive the public in the manner as to the things hereinabove alleged.

PAR. 13. In the course and conduct of their aforesaid business and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce with corporations, firms and individuals in the sale of waterproofing products and services of the same general kind and nature of those sold by respondents.

PAR. 14. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices and the failure to disclose material facts has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements and representations were, and are, true and complete and into the purchase of respondents' products and services by reason of said erroneous and mistaken belief. Respondents' aforesaid acts and practices unfairly cause the purchasing public to assume debts and obligations and to make payments of money which they might otherwise not have incurred.

PAR. 15. The aforesaid acts and practices of respondents as herein alleged were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office

proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Proposed respondent Everseal Waterproofing Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 958 Watertown St., Newton, Massachusetts.

Proposed respondent Everseal Waterproofing of New Hampshire, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Hampshire with its office and principal place of business located at 9 Capitol St., Concord, New Hampshire.

Proposed respondent Everseal Waterproofing of Maine is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maine, with its office and principal place of business located at 57 Exchange St., Portland, Maine.

Proposed respondent Irving Silverstein is a former officer of said corporations. He has formulated, directed and controlled the policies, acts and practices of said corporations and his address is 42 Sierra Road, Hyde Park, Massachusetts.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Everseal Waterproofing Corporation, a corporation, Everseal Waterproofing of New Hampshire, Inc., a corporation, and Everseal Corporation of Maine, a corporation, their successors and assigns, and their officers, and Irving Silverstein, individually, and William A. Epner, individually and as an officer of the corporations, (hereinafter referred to as "respondents"), and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, franchisee, licensee, or other device, in connection with the advertising, offering for sale, sale and distribution of residential and commercial waterproofing products or services, or other products or services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication, that respondents employ an exclusive, patented process.

2. Representing, directly or by implication, that respondents' waterproofing process will seal all types of basement walls, floors and foundations against water seepage.

3. Using the words "permanently," "completely," "perpetually," "once and for all," or other words or phrases of similar import, to describe respondents' waterproofing products, services or methods or misrepresenting in any manner the nature and effectiveness of such products, services or methods.

4. Failing to disclose in writing on the face of every contract for the pressure pumping process, in bold print, on an easily detachable form which shall be executed by the customer and retained by the seller and orally, prior to the signing of any contract, and in ten point boldface type in all advertisements, promotional materials and similar documents, the following notice:

> EVERSEAL PROVIDES TWO KINDS OF WATERPROOFING SERVICES: CHANNELING WATER AWAY FROM THE BASEMENT AND PRESSURE PUMPING A BENTONITE MIXTURE AGAINST WALLS AND FOOTINGS. THE BENTONITE MATERIAL USED IN THE PRESSURE PUMPING PROCESS WILL NOT PREVENT LEAKS IN YOUR BASEMENT UNDER CERTAIN TYPES OF SOIL AND WATER TABLE CONDITIONS. IF YOU HAVE NOT HAD ENGINEERING TESTS CONDUCTED ON YOUR PROPERTY BY A QUALIFIED ENGINEER, YOU CANNOT BE SURE THE PROCESS YOU HAVE CONTRACTED FOR WILL WORK ON YOUR HOME.

4a. Failing to disclose in radio and other electronic media advertisements the following notice:

> THE BENTONITE MATERIAL USED IN THE PRESSURE PUMPING PRO-

CESS WILL NOT PREVENT LEAKS IN YOUR BASEMENT UNDER CERTAIN TYPES OF SOIL AND WATER TABLE CONDITIONS. IF YOU HAVE NOT HAD ENGINEERING TESTS CONDUCTED ON YOUR PROPERTY BY A QUALIFIED ENGINEER, YOU CANNOT BE SURE THIS PROCESS WILL WORK.

5. Representing, directly or by implication, orally, visually or in writing, that any of said products or services are guaranteed unless the nature, extent and duration of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed, and unless respondents promptly and scrupulously fulfill all of their obligations and requirements directly or impliedly represented by the terms of the guarantee.

6. Representing, directly or by implication, that an office is maintained by respondents in any city or town other than that in which a fully staffed sales, service and installation office or place of business is, in fact, maintained, occupied and used by respondents; and from misrepresenting in any manner the size or volume of respondents' business.

7. Representing, directly or by implication, that respondents will, by means of their pressure pumping process or in any other manner, waterproof basements without digging, without damage to walks or driveways, or without the necessity of having waterproofing work done inside the basement.

8. Making any claim or representation, orally, visually or in writing, relating to the efficacy, nature and performance characteristics of respondents' waterproofing products or services unless, at the time such claim or representation is made, respondents have a reasonable basis for such claim or representation which shall consist of competent engineering or other similar objective material.

9. Failing to maintain accurate records which may be inspected and copied by Commission staff members upon reasonable notice:

(a) Which consist of documentation to support any and all claims or representations made after the effective date of this order in advertising or sales promotion material relating to the efficacy, nature and performance of any waterproofing process marketed by the respondents.

(b) Which provided the basis upon which respondents relied as of the time those claims or representations were made; and

(c) Which shall be maintained by respondents for a period of three (3) years from the date such advertising or sales promotion material was last disseminated.

10. Using in any manner a sales plan, scheme or device wherein

false, misleading or deceptive statements or representations are made, directly or by implication, in order to obtain leads or prospects for the sale of, or to induce purchases of goods and services.

11. Representing, directly or by implication, orally, visually, or in writing that any price for the products or services sold by respondents is a special or reduced price unless respondents can affirmatively show that such price constitutes a significant reduction from the price at which respondents have sold such products and services for a reasonably substantial period of time in the recent regular course of their business.

12. Failing to maintain adequate records (a) which disclose the facts upon which any savings claim, including former pricing claims and comparative value claims is based; and (b) from which the validity of any savings claim, including former pricing claims and similar representations can be determined.

13. (a) Failing to maintain a customer relations department to which purchasers of said products and services may refer complaints, requests for maintenance, or replacement of faulty products or services as promised under the terms of said contract and guarantee; and failing to furnish to each customer at the time of the purchase of said products or services, the current name, address and telephone number of such customer relations representative to which requests for service and/or maintenance may be directed by such customers.

(b) Failing to respond to customers' request for service within seven (7) days from the date of receipt thereof.

(c) Failing to maintain for a period of three (3) years, records of customers' service and maintenance requests and related documents in connection with the implementation of Paragraph Thirteen (a) and (b) above.

14. Furnishing or otherwise placing in the hands of others the means and instrumentalities by and through which the public may be misled or deceived in the manner, or by the acts and practices prohibited by this order.

15. Failing to maintain and produce for inspection and copying, for a period of three (3) years, copies of all advertisements, brochures, sales contracts, salesmen's manuals and sales bulletins, and all other promotional material utilized in the advertising, promotion and sale of such products or services.

16. Contracting for any sale of such products or services in the form of a sales contract or other agreement which shall become binding on the buyer prior to midnight of the third day, excluding Sundays and legal holidays, after the date of execution of the contract or other agreement.

17. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in boldface type of a minimum size of 10 points, a statement in substantially the following form:

YOU THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

18. Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "Notice of cancellation", which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten point boldface type the following information in statements:

NOTICE OF CANCELLATION

(enter date of transaction)

DATE

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE (3) BUSINESS DAYS FROM THE ABOVE DATE.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO (Name of Seller), AT (Address) NOT LATER THAN MIDNIGHT OF (Date).

I HEREBY CANCEL THIS TRANSACTION.

(DATE)

(BUYER'S SIGNATURE)

19. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

20. Failing or refusing to honor any valid notice of cancellation by a buyer and within three (3) business days after the receipt of such notice, to (i) refund all payments made under the contract or sale, (ii)

cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale.

1. *It is further ordered,* That:

(a) Respondents herein deliver, by registered mail, a copy of this decision and order to each of its present and future franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors or to any other person who advertises, promotes, offers for sale, sells or distributes such products or services offered by respondents.

(b) Respondents herein provide each person so described in paragraph (a) above with a form returnable to the respondents clearly stating his intention to be bound by and to conform his business practices to the requirements of this order; retain said statement during the period said person is so engaged; and make said statement available to the Commission's staff for inspection and copying upon request.

(c) Respondents herein inform each person so described in paragraph (a) above that the respondents will not use or engage or will terminate the use of engagement of any such party, unless such party agrees to and does file notice with the respondent that he will be bound by the provisions contained in this order.

(d) If such party as described in paragraph (a) above will not agree to so file the notice set forth in paragraph (b) above with the respondents and be bound by the provisions of this order, the respondents shall not use or engage or continue the use or engagement of, such party to promote, offer for sale, sell or distribute such products or services included in this order;

(e) Repondents herein inform the persons described in paragraph (a) above that the respondents are obligated by this order to discontinue dealing with or to terminate the use or engagement of persons who continue on their own the deceptive acts or practices prohibited by this order;

(f) Respondents herein institute a program of continuing surveillance adequate to reveal whether the business practices of each said person described in paragraph (a) above conform to the requirements of this order;

(g) Respondents herein discontinue dealing with or terminate the use or engagement of any person described in paragraph (a) above, as revealed by the aforesaid program of surveillance, who continues on his own any act or practice prohibited by this order.

2. *It is further ordered,* That the respondent corporations shall

forthwith distribute a copy of this order to each of their operating divisions.

3. *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

4. *It is further ordered,* That the individual respondents named herein notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

5. *It is further ordered,* That in the event that the corporate respondents merge with another corporation or transfer all or a substantial part of their business or assets to any other corporation or to any other person, said respondents shall require such a successor or transferee to file promptly with the Commission a written agreement to be bound by the terms of this order; *provided* that if said respondents wish to present to the Commission any reason why said order should not apply in its present form to said successor or transferee, they shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said succession or transfer.

6. *It is further ordered,* That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

G. & B. TEXTILES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND WOOL PRODUCTS LABELING ACTS

Docket C-2867. Complaint, Feb. 14, 1977 --- Decision, Feb. 14, 1977

Consent order requiring a New York City importer and distributor of fabrics, among other things, to cease misrepresenting the fiber content of its wool products and to notify purchasers of these fabrics that government tests have shown them to be misbranded.

Appearances

For the Commission: *Abraham A. Karlin* and *Jerry R. McDonald.*

For the respondents: *Edward S. Wactler* and *Gerald Blumburg, Kuh, Shapiro, Goldman, Cooperman & Levitt,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that G. & B. Textiles, Inc., a corporation formerly known as H.M.S. International Fabrics, Inc., and Benjamin Solomon, individually and as an officer of said corporation, and Herbert and Michael Solomon, individually and as former officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent G. & B. Textiles, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 45 West 45th St., New York, New York. It was formerly known as H.M.S. International Fabrics, Inc.

Respondent Benjamin Solomon is an officer and respondents Herbert Solomon and Michael Solomon are former officers of G. & B. Textiles, Inc. At all times relevant to the acts and practices hereinafter set forth, they formulated, directed and controlled the acts and practices of the corporate respondent. The business address of respondent Benjamin Solomon is the same as that of the corporate

respondent and that of respondents Herbert Solomon and Michael Solomon is 1290 Avenue of the Americas, New York, New York.

Respondents are engaged in the business of importing wool blend fabrics into the United States and selling such fabrics to their customers in the various states.

PAR. 2. Respondents, now and for some time last past, have introduced into commerce, sold, transported, distributed, delivered for shipment, shipped and offered for sale, in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were certain wool blend fabrics stamped, tagged, labeled, or otherwise identified by respondents as "55% polyester, 45% reprocessed wool" whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products, namely wool blend fabrics, with labels on or affixed thereto which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more, and (5) the aggregate of all other fibers.

PAR. 5. The aforesaid acts and practices of the respondents as herein alleged were, and are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed by Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional finding, and enters the following order:

1. Respondent G. & B. Textiles, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 45 West 45th St., New York, New York.

Respondent Benjamin Solomon is an officer and respondents Herbert Solomon and Michael Solomon are former officers of said corporation. At all times relevant to the allegations in the complaint, they formulated, directed and controlled the policies, acts and practices of said corporation. The business address of Benjamin Solomon is 45 West 45th St., New York, New York and that of Herbert Solomon and Michael Solomon is 1290 Avenue of the Americas, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents G. & B. Textiles, Inc., a corporation, its successors and assigns, and its officers, and Benjamin Solomon, individually and as an officer of said corporation, and Herbert Solomon and Michael Solomon, individually and as former officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the introduction, or importing for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents notify, by delivery of a copy of this order by registered mail, each of their customers that purchased the wool products which gave rise to this complaint of the fact that United States government tests have shown that such products were misbranded.

It is further ordered, That the respondent corporation forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the individual respondents named herein promptly notify the Commission of each change in business or employment status, which includes discontinuance of their present business or employment and each affiliation with a new business or employment for ten (10) years following the effective date of this order. Such notice shall include respondents' current business address and a description of the business or employment in which they are engaged as well as a description of their duties and responsibilities. The expiration of the notice provision of this paragraph shall not affect any other obligations arising under this order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of

subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

UNCLE BEN'S, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2870. Complaint, Feb. 23, 1977 — Decision, Feb. 23, 1977

Consent order requiring a Houston, Texas producer and distributor of food products, and its New York City advertising agency, among other things, to cease disseminating advertisements which depict or portray children coming close to foods in the process of being cooked, or attempting to cook foods themselves, without close adult supervision, or any other advertisements which may have the tendency to influence children to engage in behavior inconsistent with recognized safety practices.

Appearances

For the Commission: *Mark D. Gordon.*

For the respondents: *Rosenfeld, Sirowitz & Lawson,* New York City, *David Carlin, Hall, Dickler, Lawler, Kent & Howley,* New York City and *Lawrence G. Meyer, Patton, Boggs & Blow,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Uncle Ben's, Inc., a corporation, and Rosenfeld, Sirowitz & Lawson, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For the purposes of this complaint, the following definitions apply:

1. The term "commerce" means commerce as defined by the Federal Trade Commission Act, as amended.

2. The term "false advertisement" means false advertisement as defined by the Federal Trade Commission Act, as amended.

PAR. 2. Respondent Uncle Ben's, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 13000 Westheimer Road, Houston, Texas.

PAR. 3. Respondent Rosenfeld, Sirowitz & Lawson, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, and with its office and

principal place of business located at 1370 Avenue of the Americas, New York, New York.

PAR. 4. Respondent Uncle Ben's, Inc. is now, and for all times relevant to this complaint has been engaged in the production, distribution, and sale of a variety of food products, including but not limited to "Uncle Ben's Converted Rice," a brand of rice (hereinafter referred to as Uncle Ben's Rice). Said product is a "food" as defined in the Federal Trade Commission Act.

PAR. 5. Respondent Rosenfeld, Sirowitz & Lawson, Inc. was for some time an advertising agency of Uncle Ben's, Inc. and has prepared and placed for publication and has caused the dissemination of advertising material, including but not limited to the advertising referred to herein, to promote the sale of Uncle Ben's Rice.

PAR. 6. In the course and conduct of its aforesaid business, respondent Uncle Ben's, Inc. causes Uncle Ben's Rice in its product package to be transported from its place of business to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent Uncle Ben's, Inc. maintains and at all times mentioned herein has maintained, a substantial course of trade in said product in or affecting commerce. The volume of business in or affecting commerce has been and is substantial.

PAR. 7. In the course and conduct of their aforesaid businesses, respondents Uncle Ben's, Inc. and Rosenfeld, Sirowitz & Lawson, Inc. have disseminated, and caused the dissemination of, certain advertisements concerning the said product by various means in or affecting commerce including but not limited to, television advertisements broadcast by television stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product, and have disseminated, and caused the dissemination of, advertisements concerning said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product in or affecting commerce.

PAR. 8. Typical and illustrative of the statements and representations made in respondents' advertisements disseminated by means of television, but not all inclusive thereof, is the following advertisement, attached hereto and made a part hereof as Appendix A.

PAR. 9. The aforesaid advertisement has the tendency or capacity to influence children to engage in the following behavior with respect to foods which are in the process of being cooked:

(a) coming very close to foods or to containers of foods which are in the process of being cooked;

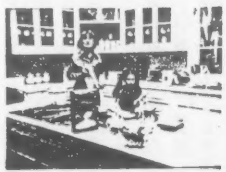
(b) attempting to cook foods by themselves without close and watchful supervision.

Therefore, such advertisement has the tendency or capacity to induce behavior which is harmful or involves an unreasonable risk of harm, and was and is an unfair or deceptive act or practice.

PAR. 10. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Uncle Ben's, Inc. has been, and is now, in substantial competition, in or affecting commerce, with other corporations engaged in the manufacture and sale of food products.

PAR. 11. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Rosenfeld, Sirowitz & Lawson, Inc. has been, and is now in substantial competition in or affecting commerce with other advertising agencies.

PAR. 12. The aforesaid acts or practices of respondents, as herein alleged as aforesaid, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.



MOTHER TO AUDIENCE: Now that Uncle Ben's is foolproof...

...during the last few minutes you don't have to watch the pot.

CHILD: Can I help?

MOTHER TO CHILD: Sure. Watch the Uncle Ben's.

MOTHER: Simmer 20 minutes. Then set is aside. It finishes cooking itself. Perfect every time.

MOTHER: Maybe you're using Minute Rice because you're afraid of cooking rice.

UNCLE BEN'S is foolproof...

...so why not try it?

CHILD: I cooked it all by myself.

ANNCR: Uncle Ben's Converted Rice. Not sticky, not starchy, and you don't have to watch the pot.

Appendix A

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Uncle Ben's, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 13000 Westheimer Road, Houston, Texas.

2. Respondent Rosenfeld, Sirowitz & Lawson, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, and with its office and principal place of business located at 1370 Avenue of the Americas, New York, New York.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

For the purposes of this order, the following definitions apply:

1. The term "commerce" means commerce as defined by the Federal Trade Commission Act, as amended.

2. The term "food" means any article used for food or drink for man or other animals.

3. The term "cooking" shall mean a process of food preparation which includes the application of heat.

4. The term "child" shall mean a person who appears to be or in fact is under the age of 12.

I

It is ordered, That the respondents Uncle Ben's, Inc., a corporation, and Rosenfeld, Sirowitz & Lawson, Inc., a corporation, (hereinafter referred to as respondents), their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale or distribution in or affecting commerce of any product, forthwith cease and desist from, directly or indirectly:

A. Representing, through depictions, descriptions, or otherwise, children closely examining, or closely approaching foods or containers of foods which are in the process of being cooked.

B. Representing, through depictions, descriptions, or otherwise, children participating in the process of cooking without close supervision of an adult.

C. Representing, through depictions, descriptions, or otherwise, children initiating participation with persons who are in the process of cooking by touching a utensil, glove, pot or other object that is being used in the process of cooking without first having received permission from an adult.

D. Representing, through depictions, descriptions, or otherwise, children without close adult supervision in a kitchen or other area where foods are in the process of being cooked, provided that this subparagraph D shall not prohibit depiction of children eating foods or children engaging in other behavior not likely to affect the cooking process in the presence of adults who are attending to the process of cooking foods.

E. Representing, through depictions, descriptions, or otherwise, children engaging in the activity in a kitchen or in an area where foods are in the process of being cooked where it is reasonably foreseeable, through reasonable inquiry, that such representation has the tendency or capacity to influence children to engage in behavior which creates an unreasonable risk of harm to themselves or to others.

II *

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

GENESCO INCORPORATED

Docket 9019. Interlocutory Order, Feb. 24, 1977

Parties to file brief memoranda in seven days as to whether they object to matter being withdrawn from adjudication while Commission considers their proposed order; respondent to advise whether it concurs in counsel supporting complaint's recommendation for adoption of administrative law judge's findings of fact, conclusions of law and order as modified by the parties.

Appearances

For the Commission: *Alan D. Reffkin, Justin Dingfelder* and *John F. LeFevre.*

For the respondent: *Sanford M. Litvack, Donovan, Leisure, Newton & Irvine,* New York City.

ORDER

On February 18, 1977, the Commission issued an order granting the parties' joint motion that their notices of intention to appeal from the initial decision be withdrawn and that further proceedings be stayed pending consideration by the Commission of the parties' proposed order. The Commission further indicated that the matter will not be withdrawn from adjudication unless and until the Commission so orders.

The Commission requests the parties to file brief memoranda, not later than seven days after the date of this order, indicating whether they object to this matter being withdrawn from adjudication while the Commission considers their proposed order.[1] In addition, respondent is requested to advise whether it concurs in complaint counsel's recommendation "that the Commission adopt the Administrative Law Judge's Findings of Fact, Conclusions of Law and Order as modified by the parties."[2]

It is so ordered.

[1] If the case were withdrawn from adjudication, the Commission would be permitted to receive advice concerning the proposed order without regard to the requirements of Section 4.7 of the Rules of Practice.

[2] Motion to Support Withdrawal of Notices of Appeal, p. 3.

IN THE MATTER OF

BIC PEN CORPORATION, ET AL.

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9095. Complaint, Feb. 9, 1977 — Final Order, Mar. 1, 1977

Order dismissing a complaint issued against a Milford, Conn., manufacturer and seller of disposable butane lighters, pantyhose, and disposable shavers and a New York City manufacturer and seller of cigarettes, beer, and razors and blades, alleging violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. The complaint was dismissed as moot upon the termination of the proposed acquisition of American Safety Razor Division of Philip Morris, Inc. by BIC Pen Corporation.

Appearances

For the Commission: *Roger J. Leifer.*

For the respondents: *Neal Pollio, Phillip, Nizer, Benjamin, Krim & Ballan,* New York City; *Donald Fried, Arnold & Porter,* New York City and *Abe Krash, Arnold & Porter,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the BIC Pen Corporation, a corporation subject to the jurisdiction of the Commission, has entered into an agreement to acquire the assets and business of the American Safety Razor Division of Philip Morris Incorporated, a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and which acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. BIC PEN CORPORATION

1. Respondent, BIC Pen Corporation, (hereinafter "BIC") is a New York corporation with its principal office and place of business located at Wiley St., Milford, Connecticut.

2. BIC is a publicly held corporation listed on the American Stock Exchange. BIC is a subsidiary of Societe BIC, S.A., a publicly held

French corporation. Societe BIC holds voting trust certificates which represent 57 percent of the outstanding common shares of BIC. Marcel Bich, a trustee of the voting trust is the only individual who may vote the shares of the trust.

3. BIC is a manufacturer and seller of writing instruments, disposable butane lighters, pantyhose and disposable shavers. In 1976 BIC was the largest seller of writing instruments, and a leading seller of disposable butane lighters in the United States with sales of over $100 million.

4. At all times relevant herein, BIC has sold or shipped products in interstate commerce and was a corporation engaged in commerce as "commerce" is defined in the Clayton Act, as amended, and was a corporation whose business was in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

II. PHILIP MORRIS INCORPORATED

5. Respondent, Philip Morris Incorporated (hereinafter "Philip Morris") is a Virginia corporation with its principal office and place of business located at 100 Park Avenue, New York, New York.

6. In 1976, Philip Morris had sales of approximately $4.3 billion, operating income of $600 million, and assets of $3.5 billion.

7. Philip Morris is a diversified company engaged in the manufacture and sale of cigarettes, beer, razors and blades. It is the 74th largest industrial company in the United States. It states that it is the second largest of the six major cigarette manufacturers in the United States, and is the second largest publicly-held cigarette company in the world. Philip Morris' subsidiary, Miller Brewing Company, is the third largest United States brewer.

8. The American Safety Razor Division (hereinafter "ASR") of Philip Morris is the third largest domestic manufacturer of razors and blades and the largest private label razor blade manufacturer in the United States.

9. In 1976, ASR's sales were $42.3 million and its income before taxes was $1.5 million. Its sales of razors and blades domestically were $29.5 million.

10. ASR manufactures the "Personna" "Gem" and "Flicker" lines of razors and blades, and manufactures industrial and surgical blades.

11. At all times relevant herein, Philip Morris has sold or shipped products in interstate commerce and was a corporation engaged in commerce as "commerce" is defined in the Clayton Act, as amended, and was a corporation whose business was in or affected commerce

within the meaning of the Federal Trade Commission Act, as amended.

III. THE PROPOSED ACQUISITION

12. On December 30, 1976 BIC and Philip Morris entered into an agreement for BIC to purchase the business and substantially all the assets of the ASR Division for approximately $20 million.

IV. TRADE AND COMMERCE

13. The relevant geographic market is the United States as a whole.

14. The relevant product market is the production and sale of razors and razor blades used in "wet-shaving."

15. In 1975, approximately 1.8 billion razor blades were sold in the United States at retail. The retail price of razors and razor blades sales was approximately $385 million and the value of factory shipments was $250 million.

16. Concentration in the production and sale of razors and blades is extremely high with the top four firms accounting for approximately 98.5 percent of total U.S. retail and wholesale sales in 1976.

17. Barriers to entry into the production and sale of razors and blades are substantial.

V. ACTUAL COMPETITION

18. In 1976 ASR was the third largest producer and seller of razors and razor blades in the United States with approximately 11 percent of wholesale shipments.

19. In July, 1976, BIC began to sell its disposable razor (the "BIC Shaver") in the North Central Region of the United States. In this limited geographic area and time period, BIC sold over 32 million BIC Shavers with factory value of $3.2 million. This amount accounted for approximately 2.4 percent of industry wholesale sales in the United States in the second half of 1976. In 1977, BIC commenced selling the BIC Shaver nationwide.

20. BIC and ASR are direct and substantial competitors in the production and sale of razors and blades in the United States. The acquisition of ASR by BIC will eliminate substantial actual competition.

VI. POTENTIAL COMPETITION

21. BIC is a significant potential competitor in the production and sale of razors and blades by reason of, among others, its being an

aggressive competitor in other products and markets, and its stated intent, aggressive actions, size, financial resources, and marketing, manufacturing and technical capabilities.

22. The BIC Shaver, which was introduced in Greece in late 1974, has captured approximately 40 percent of the razor blade market there. More recent introductions of the BIC Shaver have captured 15 to 20 percent of the market in Italy and Austria, and 10 to 15 percent of the market in France and Belgium.

23. Acquisition of ASR by BIC will preclude ASR from expanding into the disposable razor field which would make ASR a stronger competitor in the market.

24. BIC is the most likely competitor on a significant scale in the production and sale of razors and blades and is the only reasonably foreseeable company which can develop into an actual competitive force capable of offering significant competition to the four major domestic razor blade companies.

25. Manufacturers of razors and razor blades have perceived BIC to be a likely future significant competitive force on the fringe of the market and have modified their behavior in a pro-competitive manner in anticipation of BIC's entry.

VII. EFFECTS OF THE ACQUISITION

26. The effects of the acquisition of ASR by BIC may be substantially to lessen competition in the production and sale of razor blades throughout the United States in violation of Section 7 of the Clayton Act, as amended, and the effects of the acquisition may be unreasonably to restrain trade and to hinder competition unduly in the production and sale of razors and razor blades thereby constituting an unfair method of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended, in the following ways among others:

(a) Actual competition between BIC and ASR in the production and sale of razors and blades will be eliminated.

(b) The substantial likelihood of reduced future concentration in the razors and blades market through the continued strength of ASR as a significant competitor in that market will be diminished or eliminated.

(c) Significant potential competition between BIC and producers of razors and blades, including ASR, will be eliminated.

VIII. VIOLATIONS CHARGED

27. The agreement for the acquisition of ASR by BIC constitutes a

violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and the acquisition by BIC of ASR, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) and constitute a violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

Initial Decision by Joseph P. Dufresne, Administrative Law Judge

February 25, 1977

[1] A "Joint Motion To Dismiss Complaint," which was filed on February 25, 1977, recites in paragraph 6 that respondents have terminated the acquisition agreement which is the subject of the complaint in this proceeding.

They have so informed the United States District Court for the Southern District of New York where a temporary restraining order and preliminary injunction were being sought in order to hold separate the assets to be acquired and have requested the Court to dismiss that matter.

[2] In view of the foregoing, the Commission's proceeding has become moot. Accordingly, and pursuant to Commission Rules 3.22(e), 3.42(c) and 3.51,

It is ordered, That the complaint in this matter be, and it is hereby, dismissed.

Final Order

On February 25, 1977, the parties filed a joint motion with the administrative law judge requesting that he issue an Order and Initial Decision dismissing the complaint on grounds of mootness, the proposed acquisition which is the subject of the complaint having been abandoned. The same day, the ALJ issued his Initial Decision and Order dismissing the complaint as moot.

The parties have now filed a joint motion requesting that the Commission expeditiously enter a Final Decision in this matter dismissing the complaint. Upon consideration of the latter motion,

It is ordered, That the complaint in this matter be, and it hereby is, dismissed.

IN THE MATTER OF

THE AMERICAN COLLEGE OF RADIOLOGY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2871. Complaint, Mar. 1, 1977 — Decision, Mar. 1, 1977

Consent order requiring a Chicago, Ill., medical association, among other things, to cease developing, publishing and circulating relative value scales which tend to establish prices or otherwise influence fees for medical and surgical procedures and services. Additionally, respondent is required to withdraw relative value scales already published and to send copies of the complaint and order to all recipients of this data requesting the return of all copies of the material.

Appearances

For the Commission: *Lawrence E. Gray* and *Judith A. Moreland.*

For the respondent: *James M. Nicholson, Nicholson & Carter,* Washington, D.C. and *Paul G. Gebhard, Vedder, Price, Kaufman & Kammholz,* Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.,* and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The American College of Radiology has violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent, The American College of Radiology ("ACR"), is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 20 North Wacker Drive, Chicago, Ill.

PAR. 2. ACR has approximately 12,000 members and fellows who are elected from the ranks of those physicians who have been certified in radiology or one of its Board-recognized branches by the American Board of Radiology or the Royal College of Physicians and Surgeons of Canada, those physicists who have been certified in physics by the American Board of Radiology or the Royal College of Physicians and Surgeons of Canada, and those physicians engaged in nuclear medicine who have been certified as specialists in that practice by the appropriate specialty board which is a member of

either the American Board of Medical Specialties or its Canadian equivalent. Such members and fellows elect a majority of the Board of Chancellors which manages the affairs of ACR.

PAR. 3. Radiologists are licensed physicians who specialize in the use of X-ray, radium and other radioactive substances, and/or in the use of nuclear medicine and ultrasound and related procedures in the diagnosis and treatment of disease and other physical conditions. Nuclear physicians specialize in the use of nuclear medicine and related procedures in the diagnosis and treatment of disease and other physical conditions. Radiologists and nuclear physicians are generally engaged in the private practice of medicine and derive substantial portions of their professional income from fees for medical services charged to patients or to insurers.

PAR. 4. The acts and practices of ACR are in or affect commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Since 1958, ACR has, on various occasions, prepared, published, and circulated to its members and fellows and others "relative value scales" which set forth in non-monetary units comparative numerical values for procedures and services performed by radiologists and nuclear physicians. Each value is convertible into a monetary fee by the application of a dollar conversion factor to the basic unit.

PAR. 6. The preparation, publication, and circulation by ACR of relative value scales have the effect of establishing, maintaining, or otherwise influencing the fees which radiologists and nuclear physicians charge for their professional services and are in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such

complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same and placed it on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of the Commission's Rules, now in further conformity with the procedure provided by Section 2.34 of its Rules hereby issues its decision in disposition of the proceeding against the above-named respondent, makes the following jurisdictional findings, and enters the following findings and order:

1. Respondent, The American College of Radiology ("ACR"), is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal offices located at 20 North Wacker Drive, Chicago, Ill.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondent, and the proceeding is in the public interest.

ORDER

I

A. The term "relative value scale" means any list or compilation of surgical and/or medical procedures and/or services which sets forth comparative numerical values for such procedures and/or services, without regard to whether those values are expressed in monetary or non-monetary terms.

B. The term "ACR" means the American College of Radiology.

C. The term "effective date of this order" means the date of service of this order.

II

It is ordered, That ACR, its successors, or assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, shall:

A. Cease and desist from directly or indirectly initiating, originating, developing, publishing, or circulating the whole or any part of any proposed or existing relative value scale(s);

B. Cease and desist from directly or indirectly advising in favor of or against the use of, or contributing to the whole or any part of any proposed or existing relative value scale(s); *Provided, however,* that nothing contained herein shall prohibit ACR from furnishing testimony to any government body, committee. or instrumentality, or

from furnishing to any third party or government body, committee, or instrumentality such information as may be requested; to the extent, however, that such information or testimony may bear directly or indirectly on compensation levels for radiological or nuclear medicine services or procedures, it shall be limited to historical data, free of editing or interpretation, and shall be completely described as to methodology;

C. Permanently cancel, repeal, abrogate, and withdraw any and all relative value scales which it has heretofore developed, published, circulated, or disseminated;

D. Within thirty (30) days after the effective date of this order, distribute by first class mail a copy of the Commission's complaint and order in this matter, as well as a letter, in the form shown in Appendix "A" to this order, to each of its fellows and members and to each of the third party payers and others listed in Appendix "B" to this order, instructing such fellows and members and third party payers and others to return to ACR all copies of ACR relative value scales in their possession.

III

It is further ordered, That ACR shall notify the Commission at least thirty (30) days prior to any proposed change in its organization which might affect compliance obligations under this order, such as, but not limited to, dissolution, the emergence of a successor corporation, and the creation and/or dissolution of subsidiaries.

IV

It is further ordered, That ACR shall, within sixty (60) days after the effective date of this order, file with the Commission a written report showing in detail the manner and form of its compliance with each of the provisions of the order.

V

Nothing in this order shall be construed to exempt The American College of Radiology from complying with the antitrust laws or the Federal Trade Commission Act. The fact that any activity is not prohibited by this order shall not bar a challenge to it under such laws.

APPENDIX A

(ACR LETTERHEAD)

TO: Recipients of ACR Relative Value Studies

As you may be aware, the FTC has been investigating various components of health care, including relative value scale activities of ACR. The Board of Chancellors of the College no longer desires to continue such activities and has discontinued them. It has entered into an agreement with the Federal Trade Commission to formalize the discontinuance of its relative value scales.

This agreement resulted in the issuance by the Federal Trade Commission on March 1, 1977 of a complaint and the entry of a consent order which requires, in essence, that ACR:

(a) stop publishing and participating in the development of relative value scales;

(b) withdraw the relative value scales it has already published;

(c) distribute a copy of the complaint and consent order to every ACR relative value scale recipient; and

(d) instruct all recipients of ACR's relative value scales to return them to ACR.

The complaint alleges basically that ACR's relative value scales have the effect of influencing fees charged by radiologists and nuclear physicians. The consent agreement with the FTC states that it is for settlement purposes only and does not constitute an admission by the College of the charges in the complaint or that the law has been violated.

In accordance with the provisions of the FTC's order, you are to cease using and to return all copies of any College relative value scale in your possession.

The proper mailing address is:

The American College of Radiology
20 North Wacker Drive
Chicago, Illinois 60606
Attention:

Copies of the FTC's complaint and order are enclosed.

Sincerely,

_____

President

APPENDIX B

Commissioner
Medical Services Administration
Social and Rehabilitation Service
Department of Health, Education, and Welfare
330 C Street, S.W.
Washington, DC 20201

Commissioner of Social Security
Department of Health, Education, and Welfare
6401 Security Boulevard
Baltimore, MD 21235

Deputy Assistant Secretary for Health Resources and Programs
Department of Defense
Washington, DC 20301

Directorate
OCHAMPUS
Department of Defense
Washington, DC 20301

National Association of
Blue Shield Plans
211 East Chicago Avenue
Chicago, IL 60611

ØCHAMPUS
Department of Defense
Denver, CO 80240

Health Application Systems
1633 Bayshore Highway
Burlingame, CA 94010

Blue Cross of Southern California
Box 27747
4777 Sunset Boulevard
Los Angeles, CA 90027

Blue Cross and Blue Shield
of Alabama
930 S. 20th Street
Birmingham, AL 35298

Blue Cross of Northern California
1950 Franklin Street
Oakland, CA 94659

Blue Cross of Arizona, Inc.
321 W. Indian School Road
Box 13466
Phoenix, AZ 85002

Blue Shield of California
2 North Point
San Francisco, CA 94113

Arizona Blue Shield Medical
Service
321 W. Indian School Road
Box 13466
Phoenix, AZ 85002

Colorado Hospital Service - BC
244 University Boulevard
Denver, CO 80206

Arkansas Blue Cross and Blue
Shield, Inc.
601 Gaines Street
Box 2181
Little Rock, AR 72203

Colorado Medical Service, Inc. BS
244 University Boulevard
Denver, CO 80206

Connecticut Medical Service, Inc
221 Whitney Avenue
New Haven, CT 06509

Connecticut Blue Cross, Inc.
Box 504
370 Bassett Road
North Haven, CT 06473

Blue Cross and Blue Shield of
Delaware, Inc.
201 W. 14th Street
Box 1991
Wilmington, DE 19899

Hawaii Medical Service Association
1504 Kapiolani Boulevard
Box 860
Honolulu, HI 96808 BS

Group Hospitalization, Inc. BC
550 12th Street, S.W.
Washington, DC 20024

Blue Cross of Idaho, Inc.
1501 Federal Way
Box 7408
Boise, ID 83707

Medical Service of the District of Columbia BS
550 12th Street, S.W.
Washington, DC 20024

North Idaho District Medical Service
Bureau, Inc. BS
1602 21st Avenue
Box 1106
Lewiston, ID 83501

Blue Cross of Florida, Inc.
532 Riverside Avenue
Box 1798
Jacksonville, FL 32201

Blue Shield of Florida, Inc.
532 Riverside Avenue
Box 1798
Jacksonville, FL 32201

Blue Cross of Georgia/Atlanta Inc.
1010 West Peachtree St., N.W.
Box 4445
Atlanta, GA 30302

Blue Cross of Georgia/Columbus Inc.
2357 Warm Springs Road
Box 1520
Columbus, GA 31902

Blue Shield of Georgia/Atlanta Inc.
1010 West Peachtree St., N.W.
Box 4445
Atlanta, GA 30302

Blue Shield of Georgia/Columbus Inc.
2357 Warm Springs Road
Box 1520
Columbus, GA 31902

Blue Shield of Iowa
Liberty Building
Des Moines, IA 50307

Kansas Hospital Service Association, Inc.
1133 Topeka Avenue
Box 239
Topeka, KS 66601

Kansas Blue Shield
1133 Topeka Avenue
Box 239
Topeka, KS 66601

Blue Cross Hospital Plan Inc.
3101 Bardstown Road
Louisville, KY 40205

Illinois Hospital and Health BC Service Inc.
227 N. Wyman Street
Rockford, IL 61101

Hospital Service Corporation BC
233 North Michigan Avenue
Box 1364
Chicago, IL 60601

Illinois Medical Service - BS
233 North Michigan Avenue
Chicago, IL 60601

Blue Cross of Indiana
120 W. Market Street
Indianapolis, IN 46204

Mutual Medical Insurance Inc. BS
120 W. Market Street
Indianapolis, IN 46204

Blue Cross of Iowa
Liberty Building
Sixth Street & Grand Avenue
Des Moines, IA 50307

Blue Cross of Michigan
600 Lafayette E.
Detroit, MI 48226

Blue Shield of Michigan
600 Lafayette E.
Detroit, MI 48226

Blue Cross and Blue Shield of Minnesota
3535 Blue Cross Road
Box 3560
St. Paul, MN 55165

Blue Cross and Blue Shield of Minnesota
2344 Nicollet Avenue
Minneapolis, MN 55404

Kentucky Physicians' Mutual, Inc.
3101 Bardstown Road
Louisville, KY 40205

Blue Cross of Louisiana
10225 Florida Boulevard
Box 15699
Baton Rouge, LA 70815

Hospital Service Association of New Orleans-BC
2026 St. Charles Avenue
New Orleans, LA 70130

Maine Blue Cross and Blue Shield
110 Free Street
Portland, ME 04101

Blue Cross of Maryland
700 E. Joppa Road
Box 9836
Towson, MD 21204

Blue Shield of Maryland, Inc.
700 E. Joppa Raod
Towson, MD 21204

Blue Cross of Massachusetts
133 Federal Street
Boston, MA 02106

Blue Cross and Blue Shield of South Carolina
I-20 East at Alpine Road
Columbia, SC 29219

Blue Cross of Western Iowa and South Dakota
Third & Pierce Streets
Box 1677
Sioux City, IO 51102

South Dakota Medical Service, Inc.
711 N. Lake Avenue
Sioux Falls, SD 57104

Blue Cross-Blue Shield of Tennessee
801 Pine Street
Chattanooga, TN 37402

Blue Cross and Blue Shield of Mississippi, Inc.
530 E. Woodrow Wilson Drive
Box 1043
Jackson, MS 39205

Blue Cross of Kansas City
3637 Broadway
Box 169
Kansas City, MO 64141

Blue Cross Hospital Service, Inc. of Missouri
1430 Olive Street
St. Louis, MO 63103

Blue Shield of Kansas City
3637 Broadway
Box 169
Kansas City, MO 64141

St. Louis Blue Shield
5775 Campus Parkway
Hazelwood, MO 63042

Blue Cross of Montana
3360 10th Avenue S.
Great Falls, MT 59405

Montana Physicians' Service - BS
404 Fuller Avenue
Box 1677
Helena, MT 59601

Blue Cross of Virginia
2015 Staples Mill Road
Box 27401
Richmond, VA 23279

Blue Cross of Southwestern Virginia
1212 Third Street, S.W.
Box 2770
Roanoke, VA 24001

Blue Shield of Virginia
2015 Staples Mill Road
Box 27401
Richmond, VA 23279

Blue Shield of Southwestern Virginia
1212 Third Street, S.W.
Box 2770
Roanoke, VA 24001

Kitsap Physicians' Service
820 Pacific Avenue
Box 339
Bremerton, WA 98310

Blue Cross Hospital Service, Inc.
Commerce Square
Box 1343
Charleston, WV 23225

West Virginia Hospital Service, Inc.
20th & Chapline Streets
Wheeling, WV 26003

Blue Shield of Southern West Virginia, Inc.
Commerce Square
Box 1353
Charleston, WV 23235

Morgantown Medical-Surgical Service, Inc.
265 High Street
Morgantown, WV 26505

West Virginia Medical Service Inc.
20th & Chapline Streets
Box 6246
Wheeling, WV 26003

Associated Hospital Service, Inc.
4115 N. Teutonia Avenue
Box 2025
Milwaukee, WI 53201

Wisconsin Physicians' Service
330 E. Lakeside Street
Box 1109
Madison, WI 53701

Surgical Care, The Blue Shield Plan of the Medical Society of Milwaukee County
756 N. Milwaukee Street
Milwaukee, WI 53202

Blue Cross of Wyoming

Associated Hospitals, Inc.
401 Federal Street
Box 131
Bluefield, WV 24701

Parkersburg Hospital Service, Inc.
203 Union Trust Building
Box 1948
Parkersburg, WV 26101

Surgical Service, Inc.
Commercial Bank Building
Box 131
Bluefield, WV 24701

Medical-Surgical Service, Inc.
Union National Bank Building
Clarksburg, WV 26301

Memphis Hospital Service and Surgical Association, Inc.
85 N. Danny Thomas Boulevard
Box 98
Memphis, TN 38101

Group Hospital Service, Inc.
Main at N. Central Expressway
Dallas, TX 75201

Group Life and Health Insurance Co.
Main at N. Central Expressway
Dallas, TX 75201

Blue Cross of Utah
2455 Parley's Way
Box 270
Salt Lake City, UT 84110

Blue Shield of Utah
2455 Parley's Way
Box 270
Salt Lake City, UT 84110

Blue Shield of Wyoming

4020 House Avenue
Box 2266
Cheyenne, WY 82001

Genesee Valley Medical Care, Inc.
41 Chestnut Street
Rochester, NY 14647

Blue Shield of Central New York, Inc.
344 S. Warren Street
Syracuse, NY 13202

Medical and Surgical Care, Inc.
5 Hopper Street
Utica, NY 13501

Blue Cross and Blue Shield of
North Carolina
P. O. Box 2291
1830 Chapel Hill-Durham Blvd.
Durham, NC 27702

Blue Cross of North Dakota
301 S. Eighth Street
Fargo, ND 58102

Blue Shield of North Dakota
301 S. Eighth Street
Fargo, ND 58102

Blue Cross Hospital Plan, Inc.
201 Ninth Street, N.W.
Canton, OH 44702

Blue Cross of Southwest Ohio
1351 William Howard Taft Rd.
Cincinnati, OH 45206

Blue Cross of Northeast Ohio
2066 E. Ninth Street
Cleveland, OH 44115

Blue Cross of Central Ohio
174 E. Long Street
Columbus, OH 43215

Blue Cross of Lima, Ohio
7 Public Square

4020 House Avenue
Box 2266
Cheyenne, WY 82001

Medical Mutual of Cleveland,
Inc.
2060 E. Ninth Street
Cleveland, OH 41115

Ohio Medical Indemnity, Inc
6740 N. High Street
Worthington, OH 43085

Blue Cross and Blue Shield of Oklahoma
1215 S. Boulder Avenue
Box 3283
Tulsa, OK 74102

Blue Cross of Oregon
100 S.W. Market Street
Box 1271
Portland, OR 97207

Oregon Physicians' Service
619 S.W. 11th Avenue
Box 1071
Portland, OR 97207

Blue Cross of Lehigh Valley
1221 Hamilton Street
Allentown, PA 18102

Capital Blue Cross
100 Pine Street
Harrisburg, PA 17101

Blue Cross of Greater
Philadelphia
1333 Chestnut Street
Philadelphia, PA 19107

Blue Cross of Western
Pennsylvania
1 Smithfield Street
Pittsburg PA 15222

Blue Cross of Northeastern
Pennsylvania
15 S. Franklin Street
Wilkes-Barre, PA 18701

Pennsylvania Blue Shield
Blue Shield Building

233-738 O - 77 - 11

Box 1046
Lima, OH 45802

Blue Cross of Northwest Ohio, Inc.
3737 Sylvania Avenue
Box 943
Toledo, OH 43656

Blue Cross of Nebraska
Box 3248
Main P.O. Station
Omaha, NB 68103

Blue Shield of Nebraska
Box 3248
Main P.O. Station
Omaha, NB 68103

Nevada Blue Shield
3660 Baker Lane
Reno, NV 89502

New Hampshire-Vermont Hospitalization Service - BC
2 Pillsbury Street
Concord, NH 03301

New Hampshire-Vermont Physicians' Service
2 Pillsbury Street
Concord, NH 03301

Hospital Service Plan of New Jersey - BC
33 Washington Street
Box 420
Newark, NJ 07101

Medical-Surgical Plan of New Jersey - BS
33 Washington Street
Newark, NJ 07102

New Mexico Blue Cross and Blue Shield, Inc.
12800 Indian School Road N.E.
Albuquerque, NM 87112

Blue Cross of Northeastern New York, Inc.
Camp Hill, PA 17011

Blue Cross and Blue Shield of Rhode Island
Box 1298
444 Westminster Mall
Providence, RI 02901

Chautauqua Region Hospital Service Corporation
306 Spring Street
Box 1119
Jamestown, NY 14701

Associated Hospital Service of New York
622 Third Avenue
New York, NY 10017

Rochester Hospital Service Corporation
41 Chestnut Street
Rochester, NY 14647

Blue Cross of Central New York, Inc.
344 S. Warren Street
Box 271
Syracuse, NY 13201

Hospital Plan, Inc.
5 Hopper Street
Utica, NY 13501

Hospital Service Corporation of Jefferson County
158 Stone Street
Watertown, NY 13601

Blue Shield of Northeastern New York, Inc.
Box 8650
Albany, NY 12208

Blue Shield of Western New York, Inc.
298 Main Street
Buffalo, NY 14202

Chautauqua Region Medical Service, Inc.

1251 New Scotland Road
Box 8650
Albany, NY 12208

Blue Cross of Western New York, Inc.
298 Main Street
Buffalo, NY 14202

Blue Cross of Washington-Alaska, Inc.
15700 Dayton Avenue, North
Seattle, WA 98133

The Indiana State Medical Association
3935 North Meridian Street
Indianapolis, IN 46208

Continental Service Life & Health Insurance Company
Box 3397
5353 Florida Boulevard
Baton Rouge, LA 70821

Blue Cross & Blue Shield of Greater New York
622 3rd Avenue
New York, NY 10016

Missouri Medical Service
5775 Campus Parkway
Hazelwood, MO 63042

Washington Physicians' Service
220 West Harrison Street
Seattle, WA 98119

New York Life Insurance Company
51 Madison Avenue
New York, NY 10010

Prudential Insurance Company of America
Prudential Plaza
Newark, NJ 07101

Continental Assurance Company
CNA Plaza
Chicago, IL 60605

306 Spring Street
Jamestown, NY 14701

United Medical Service, Inc.
2 Park Avenue
New York, NY 10016

California Physicians' Service
P. O. Box 7608
San Francisco, CA 94120

Colorado Medical Service, Inc.
244 University Blvd.
Denver, CO 80206

Connecticut General Life Insurance Company
Hartford, CT 06115

Medical Association of Georgia
938 Peachtree Street, N.E.
Atlanta, GA 30309

Mississippi State Medical Association
735 Riverside Drive
Jackson, MS 39216

Medical-Surgical Care, Inc.
203 Union Trust Building
Box 1948
Parkersburg, WV 26101

Metropolitan Life Insurance Company
1 Madison Avenue
New York, NY 10010

The Travelers Insurance Company
1 Tower Square
Hartford, CT 06115

Aetna Life Insurance Company
151 Farmington Avenue
Hartford, CT 06115

Bankers Life Company
711 High Street
Des Moines, IA 50307

Nationwide Life Insurance Company
246 North High Street
Columbus, OH 43216

Equitable Life Assurance
Society of the U.S.
1285 Avenue of the Americas
New York, NY 10019

Reliance Insurance Group
4 Penn Center Plaza
Philadelphia, PA 19103

Occidental Life Insurance Company of
California
Box 2101 Terminal Annex
Los Angeles, CA 90054

Blue Shield of Massachusetts,
Inc.
133 Federal Street
Boston, MA 02106

Nevada State Medical Association
3660 Baker Lane
Reno, NV 89502

Employers Life Insurance
Company of Wausau
2000 Westwood Drive
Wausau, WI 54401

Colonial Penn Life Insurance Company
5 Penn Center Plaza
Philadelphia, PA 19103

Firemen's Fund Insurance Company
3333 California Street
San Francisco, CA 94118

Zurich Life Insurance Company
111 West Jackson Boulevard
Chicago, IL 60604

Mutual of Omaha Insurance Company
Dodge at 33rd Street
Omaha, NE 68131

Blue Cross of Eastern Ohio, Inc.
2400 Market Street
Youngstown, OH 44507

IN THE MATTER OF

MATSUSHITA ELECTRIC CORPORATION OF AMERICA

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9048. Complaint, July 22, 1975 — Decision, Mar. 4, 1977

Consent order requiring a Secaucus, N.J., manufacturer of bicycles, television and audio equipment, and major home appliances, among other things, to cease falsely or misleadingly referring to, or misrepresenting the results of tests, surveys and studies to support superiority claims for its consumer products.

Appearances

For the Commission: *Melvin H. Orlans* and *Cynthia L. Ingersoll.*

For the respondent: *Weil, Gotshal & Manges,* New York City and *Seth Waller* and *James Katz,* in-house counsel.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Matsushita Electric Corporation of America, a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Matsushita Electric Corporation of America is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 1 Panasonic Way, Secaucus, New Jersey.

PAR. 2. Respondent is now and for some time has been engaged in the offering for sale, sale, and advertising of various consumer products, including color television receivers, which when sold are shipped to purchasers located in the various States of the United States. Thus respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said consumer products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Respondent at all times mentioned herein has been, and now is, in substantial competition in commerce with individuals, firms and corporations engaged in the sale and distribution of consumer products of the same general kind and nature as those offered for sale, sold and advertised by respondent.

* Reported as modified by Commission order dated June 8, 1977.

PAR. 4. In the course and conduct of its business, respondent has disseminated and caused the dissemination of advertisements concerning the aforementioned products, including color television receivers, in or affecting commerce by means of advertisements printed in magazines and newspapers distributed by the mail and across state lines and transmitted by television stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products, including color television receivers.

PAR. 5. Among the advertisements disseminated or caused to be disseminated by respondent is the advertisement attached as Exhibit A, which includes the following statements and representations:

> In fact, the National Electronics Association rated the Quatrecolor CT-701 as the easiest to service of all color televisions they tested in plant through June 1973.

PAR. 6. Through the aforesaid advertisement, respondent has represented directly or by implication that:

1. The test(s) conducted by the National Electronics Association ("NEA") in plant through June 1973 established that the Panasonic Quatrecolor CT-701 was the easiest to service of all color televisions tested.

2. The test(s) conducted by NEA in plant through June 1973 established that the Panasonic Quatrecolor CT-701 was the least expensive or least time-consuming to service of all color televisions tested.

3. A broad sample of major or well-known brands of color television sets was tested in plant by NEA through June 1973.

PAR. 7. In truth and in fact:

1. The test(s) conducted by NEA did not, in fact, establish that the Panasonic Quatrecolor CT-701 was the easiest to service of all color televisions tested in plant by NEA through June 1973.

2. The test(s) conducted by NEA did not, in fact, establish that the Panasonic Quatrecolor CT-701 was the least expensive or least time-consuming to service of all color televisions tested in plant by NEA through June 1973.

3. A broad sample of major or well-known brands of color television sets was not tested in plant by NEA through June 1973.

Therefore, the statements and representations contained in Exhibit A, as set forth in Paragraphs Five and Six, were and are false, misleading and deceptive.

PAR. 8. The use by the respondent of the aforesaid false, misleading

and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitiors and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

4 cold, calculated reasons to buy Quatrecolor™

Choosing a color TV is no spur-of-the-moment decision. You need some pretty strong reasons to pick one set over another.

Like the Quatrecolor™ *modular chassis* that makes servicing quick and easy. Because 75% of all our circuitry is built onto 5 circuit boards.

In fact, the National Electronics Association rated the Quatrecolor CT-701 as the easiest to service of all color televisions they tested in plant through June 1973.

Of course, we want those service calls to be few and far between. So we engineer every Quatrecolor set with *100% solid-state* circuitry. To run cooler and last longer. Because the only tube is the picture tube.

And what a picture tube. We call it *Para-Matrix*™. It surrounds each color dot with a black background. So you get bright, vivid colors. And a sharp picture.

And you don't have to worry about drops or surges in voltage ruining the picture. Because Quatrecolor has a special automatic voltage regulator circuit with SCR (Silicon Control Rectifier) that maintains the correct voltage level.

You won't have to fiddle with a bunch of knobs to keep the picture beautiful, either. Because Panasonic gives you *Q-Lock*. One button that electronically controls color, tint, contrast and brightness.

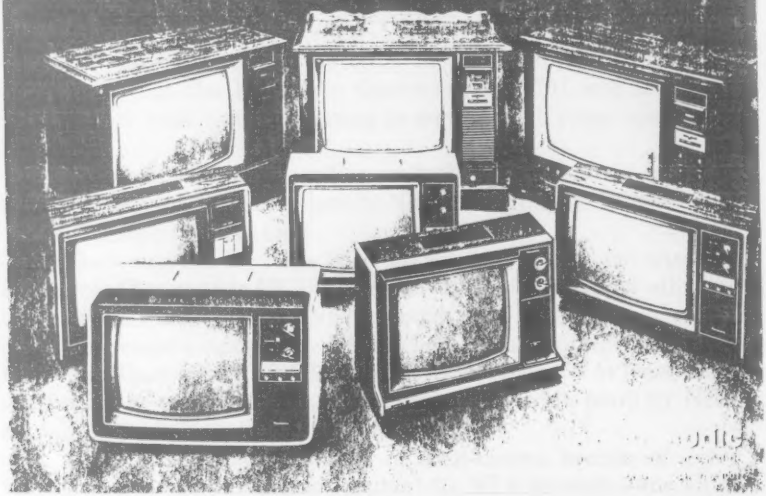
And Q-Lock's active color and tint circuits automatically seek out and maintain the best color picture. Even when you change channels, or atmospheric conditions affect the signal.

Quatrecolor. From 17" portables up to 25" consoles (measured diagonally).

After all we put into them, you owe it to yourself to go see the picture that comes out of them.

Quatrecolor™

and 8 more that just look nice.



DECISION AND ORDER

The Federal Trade Commission having issued a complaint which charges respondent Matsushita Electric Corporation of America with violating the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated or that any of the facts are true as alleged in the said complaint of the Commission issued in this proceeding, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Matsushita Electric Corporation of America is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1 Panasonic Way, Secaucus, New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent, Matsushita Electric Corporation of America, a corporation, its successors and assigns, and respondent's officers, representatives, agents and employees, directly or through any corporation, division, or other device, in connection with the advertising, offering for sale, distribution, or sale of video and audio equipment, major home appliances, and bicycles to consumers for personal, family, or household use, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

1. By any reference to a test or the results thereof, representing, directly or by implication, that any such product is superior to any other product in any respect unless:

(a) such test is appropriately designed and conducted for the

comparative evaluation of the characteristic or attribute about which the specific representation is made;

(b) the results of such test establish the comparative superiority represented;

(c) such test establishes, to a degree significant to consumers, that such product is superior to each compared product in the characteristic or attribute about which the specific representation is made; and

(d) such test is based upon a broad sample of the major or well-known brands of such product, except when the brands involved in the test are named.

2. Representing, directly or by implication, that any television receiver is easier to service than any other television receiver when respondent knows or should know that the television receiver is in fact more costly or more time consuming to service than such other television receiver.

3. Misrepresenting in any manner, directly or by implication, the results of conclusions of any test, survey, evaluation, report, study, research, or analysis of a television receiver.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent submit to the Federal Trade Commission, within sixty (60) days from the effective date of this order, a detailed report describing the actions that respondent has taken in order to comply with said order. In addition, respondent shall, for a period of three (3) years at one (1) year intervals from the effective date of this order, submit to the Federal Trade Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of any subsidiary or any other changes in the corporation structure which may affect any compliance obligation arising out of this order.

IN THE MATTER OF

WALTER SWITZER, INC., T/A SWITZER'S, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-2872. Complaint, Mar. 4, 1977 — Decision, Mar. 4, 1977

Consent order requiring a Phoenix, Arizona, retailer of women's wearing apparel, including furs and fur products, among other things, to cease violating the labeling, invoicing, and advertising provisions of the Fur Products Labeling Act.

Appearances

For the Commission: *Gerald E. Wright.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Walter Switzer, Inc., a corporation, doing business as Switzer's, and Walter E. Switzer, Jr., individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Walter Switzer, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona, with its principal office and place of business located at 25 E. Adams St., Phoenix, Arizona.

Respondent Walter E. Switzer, Jr. is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including those hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are retailers of women's wearing apparel, including but not limited to furs and fur products, with retail stores in Phoenix, Scottsdale, and Mesa, Arizona; Las Vegas, Nevada; and El Paso, Texas.

PAR. 3. Respondents are now and for some time last past have been engaged in the introduction into commerce, and in the sale, advertis-

ing, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the rules and regulations promulgated thereunder. Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

1. To show the true animal name or animals which produced the fur used in such fur product.

2. To disclose that the fur contained in the fur product was natural, bleached, dyed, or otherwise artificially colored, when such was the fact.

3. To disclose that the fur product was composed in whole or in substantial part of paws, tails, bellies, sides, flanks, gills, ears, throats, or heads, when such was the fact.

4. To disclose the country of origin of imported fur products.

5. To disclose the required fur information in a legible manner on one side of the label.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

1. To show the true animal name of the animal which produced the fur used in such fur products.

2. To disclose that the fur contained in the fur product was natural, bleached, dyed, or otherwise artificially colored, when such was the fact.

3. To disclose that the fur product was composed in whole or in substantial part of paws, tails, bellies, sides, flanks, gills, ears, throats, or heads, when such was a fact.

4. To disclose the required Item Number.

5. To disclose the country of origin of imported fur products.

PAR. 6. Certain of said fur products were falsely and deceptively advertised by respondents in that they were not advertised as required by Section 5(a) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder.

Among such falsely and deceptively advertised fur products, but not limited thereto, were fur products advertised in the Las Vegas Review-Journal and the Arizona Republic, which failed to disclose that the fur contained in the fur product was natural, bleached, dyed or otherwise artificially colored when such was a fact.

PAR. 7. The aforesaid acts and practices of respondents as herein alleged, are in violation of the Fur Products Labeling Act and the rules and regulations promulgated thereunder and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Fur Products Labeling Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Walter Switzer, Inc., d/b/a Switzer's, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona, with its principal place of business located at 25 East Adams St., Phoenix, Arizona.

Respondent Walter E. Switzer, Jr., is an officer of said corporation. He formulates, directs and controls the acts, practices and policies of

said corporation, and his address is the same as that of the corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That Walter Switzer, Inc., a corporation, trading and doing business as Switzer's, or under any other name, its successors and assigns, and its officers, and Walter Switzer, Jr., individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding any fur product by failing to affix a label to such fur product showing in words and in figures plainly legible all of the information required to be disclosed by each subsection of Section 4(2) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder.

B. Falsely or deceptively invoicing any fur product by failing to furnish an invoice, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words or figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder.

C. Falsely or deceptively advertising any fur product by failing to show in words plainly legible all the information required to be disclosed by each of the subsections of Section 5(a) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder.

It is further ordered, That the respondent corporation shall forthwith distribute of copy of this order to each of its operating divisions.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the

emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

EXXON CORPORATION, ET AL.

Docket 8934. Interlocutory Order, Mar. 8, 1977

Denial of respondents' motion for reconsideration.

ORDER DENYING MOTION FOR RECONSIDERATION

On Jan. 25, 1977, the Commission issued an order denying respondents' request for interlocutory review of the administrative law judge's protective order of Jan. 5 on the ground that the ALJ, pursuant to Section 3.23(b) of the Commission's Rules of Practice, had not made a determination that an appeal would be appropriate. The Commission noted that, despite the parties' suggestions to the contrary, the law judge had certified to the Commission only one portion of his protective order (paragraph nine) regarding assurances of prior notification before confidential information is disclosed pursuant to Freedom of Information Act and Congressional committee requests. The portion of the order certified was the subject of a separate Commission order of Jan. 31. In that order the Commission again noted that the ALJ had certified only one portion of the order.

Respondents argue that the Jan. 25 order, unless modified, will work serious prejudice to respondents since "[i]n light of the uniformity of the parties' interpretation of the Administrative Law Judge's certification and the absence of any indication that such certification was in any way limited to fewer than all of the issues raised by the protective order, respondents refrained from filing any separate certification request with the Administrative Law Judge." Finally, respondents argue that the Jan. 31 order "appears to confirm the validity of respondents' concerns about the reliability of any protective order entered by this agency."

With respect to respondents' claim of prejudice, the Commission notes that on Feb. 3, the ALJ issued an order confirming that his certification was limited to paragraph nine. On Feb. 10, "in consideration of respondents' assertion that the reason they did not request certification of my protective order within the time allowed was their understanding that the entire order had been certified," he authorized the filing of respondents' request for certification and, thereupon, denied the request. As for respondents' claim going to the merits of the Commission's Jan. 31 order, the Commission adheres to its view that the order provides appropriate protection. Accordingly,

It is ordered, That the aforesaid motion for reconsideration be, and it hereby is, denied.

IN THE MATTER OF

CEZAR, LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-2873. Complaint, Mar. 14, 1977 — Decision, Mar. 14, 1977

Consent order requiring a New York City importer and manufacturer of men's and boys' shirts, among other things to cease violating the Textile Fiber Products Identification Act by misbranding textile fiber products and failing to maintain required records.

Appearances

For the Commission: *Martin Gorman.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and the Textile Fiber Products Identification Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Cezar, Ltd., a corporation, and William Arnold, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Textile Fiber Products Identification Act, and it now appearing to the Commission that a proceeding by it in respect thereof would be in the public interest hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Cezar, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 232 Madison Ave., New York, New York.

Respondent William Arnold is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

Respondents are now, and for some time last past have been, engaged in the importation and sale of textile fiber products including but not limited to men's shirts.

PAR. 2. Respondents are now and for some time past have been engaged in the introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in

commerce, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products which have been advertised or offered for sale in commerce, and have sold, offered for sale, advertised, delivered, transported, and caused to be transported after shipment in commerce, textile fiber products as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of the constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products, namely men's shirts, stamped, tagged, labeled or otherwise identified by respondents as "polyester and cotton" whereas in truth and in fact, said products contained polyester and rayon.

PAR. 4. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products, namely men's shirts, with labels which failed:

1. To disclose the true generic names of the fibers present; and
2. To disclose the percentage of such fibers by weight.

PAR. 5. Certain of said textile fiber products were misbranded by respondents in that fiber trademarks were placed on labels without the generic names of fibers appearing on such labels in immediate conjunction therewith, in violation of Rule 17(a) of the rules and regulations promulgated under the Textile Fiber Products Identification Act.

PAR. 6. Respondents have failed to maintain and preserve proper records showing the fiber content of textile fiber products manufactured by them, in violation of Section 6(a) of the Textile Fiber Products Identification Act and Rule 39 of the rules and regulations promulgated thereunder.

PAR. 7. The acts and practices of respondents as set forth above

were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in or affecting commerce within the intent and meaning of the Federal Trade Commission Act, as amended.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended, and the Textile Fiber Products Identification Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Cezar, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 232 Madison Ave., New York, New York.

Respondent William Arnold is an officer of the corporate respondent. He formulates, directs, and controls the acts and practices of the corporate respondent and his address is the same as that of the corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Cezar, Ltd., a corporation, its successors and assigns and its officers, and William Arnold, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with the introduction, sale, advertising or offering for sale in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce of any textile fiber product, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

1. Misbranding textile fiber products by:

a. falsely or deceptively stamping, tagging, labeling, invoicing or otherwise identifying such products as to the name or amount of the constituent fibers contained therein;

b. failing to affix a stamp, tag, label or other means of identification to each such product showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act;

c. using a fiber trademark on labels affixed to textile fiber products without the generic name of the fiber appearing in immediate conjunction therewith in type or lettering of equal size and conspicuousness.

2. Failing to maintain and preserve proper records of fiber content of textile fiber products manufactured by respondents, as required by Section 6(a) of the Textile Fiber Products Identification Act and Rule 39 of the Rules and Regulations promulgated thereunder.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of each change in business or employment status, which includes discontinuance of his present business or employment, for ten (10) years following the effective date of this order. Such notice shall include respondent's current business address and a description of the business or employment in which he is engaged as well as a description of his duties and responsibilities. The expiration of the notice provisions of this paragraph shall not affect any other obligations arising under this order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

SPIEGEL, INC.

Docket 8990. Interlocutory Order, Mar. 22, 1977

Denial of respondent's petition for modification of the modified final order.

ORDER DENYING PETITION FOR RECONSIDERATION

Respondent has filed a petition dated Jan. 31, 1977, which asks the Commission to reconsider its order entered Dec. 26, 1976, pursuant to the opinion of the Seventh Circuit Court of Appeals. The Court of Appeals affirmed and enforced "as modified" the Commission's original order to cease and desist entered on Aug. 18, 1975.[1]

This proceeding has not been remanded to the Commission. The Court of Appeals enforced the Commission's order "as modified", and in modifying its order the Commission acted ministerially pursuant to the mandate of the Court of Appeals. The Commission's original order prohibited Spiegel from suing a defaulting consumer debtor in a court located elsewhere than in the debtor's home county or in the county wherein the contract sued upon was executed. The court believed this order provision was overly broad, and in its opinion the court stated:

> Therefore, we are of the opinion that the Commission's order should not be enforced insofar as it relates to Illinois consumers who are sued in a county courthouse which is a reasonable distance from their place of residence.

In accordance with this explicit instruction, the Commission modified its order to permit suits by Spiegel against Illinois residents in an Illinois county courthouse which is not an unreasonable distance from the consumer's place of residence.

Spiegel now contends that the foregoing language notwithstanding, it was the intention of the Court of Appeals to modify the

[1] Complaint counsel argue that pursuant to Section 5(i) of the FTC Act, 15 U.S.C. 45, the "order of the Commission rendered in accordance with the mandate of the Court of Appeals" shall become final within 30 days from the time such order was rendered, unless either party has "instituted proceedings to have such order corrected* * *" Since more than 30 days have elapsed from the time the Commission's order was rendered, (and had elapsed when Spiegel's petition was filed) counsel argue that the order is final and Spiegel's petition can at best be construed as a petition for reopening. Spiegel purports to petition pursuant to Section 3.55 of the Rules of Practice, which allows petitions for reconsideration of Commission "decisions" to be filed within 20 days of completion of service. We agree that it is desirable that parties apply first to the Commission for modification of what they construe to be an improper implementation of an appellate court mandate. On the other hand, we do not believe that such application for modification constitutes the "institution of a proceeding to have the order corrected," such as would stay finality of the order. In our view Section 5(i) is most fairly read to render modified orders final within 30 days from date of service, unless respondent seeks review in the Court of Appeals, or the order is stayed, and our own rules are best read to allow a petition for reconsideration of a modified order within 20 days, pursuant to Rule 3.55, with the proviso, as the rule notes, that such petition does not stay the effective date of the order. Accordingly we believe the order in this matter has become final, but we shall nonetheless address the substance of petitioner's request.

Commission's order to eliminate all restraints upon suits against Illinois residents filed by Spiegel in Illinois. Spiegel bases its contention upon a footnote to the above-quoted portion of the court's opinion, in which the court notes that by failing to allege violations based upon suits within Illinois, the Commission did not lay an adequate predicate for the "blanket order" it originally entered.

As we read this footnote, however, it is hardly dispositive with respect to the appropriate remedy, and can provide no basis for the Commission to ignore the explicit textual instruction upon which it originally relied. The court was clearly troubled by the fact that the Commission's order would have prohibited suits in Cook County against consumers in a neighboring county, *e.g.,* Du Page County. After noting this example the court stated that

> Since the complaint did not allege any venue problems with suits against Illinois residents we see no reason for the FTC to abridge Spiegel's right to bring suit *wherever the law allows.*

Immediately thereafter, however, the court observes that suits in Cook County against a consumer living in Cairo, hundreds of miles away, would run afoul of the law, *i.e.,* Section Five of the FTC Act. Thus, while the Commission's blanket order respecting intra-Illinois suits was not considered justified by the court, a restriction against intra-Illinois suits at "unreasonable" distances can be readily justified as "fencing in" against violations of Section Five relating to abuse of venue similar to those proven at trial.[2] In any event, under the circumstances we do not believe we are at liberty to ignore language which is in form an express and absolute mandate to the Commission in favor of respondent's interpretation of surrounding dictum. Therefore,

It is ordered, That petitioner's request to modify the modified final order in this matter be, and it hereby is, denied.

[2] It is also to be observed that the "notice order" served with the complaint in this matter, did give notice of the Commission's intention to forbid, without distinction as to state, "[i]nstituting suits except in the county where defendant resides at the commencement of the action, or in the county where the defendant signed the contract sued upon* * *"

IN THE MATTER OF

BRYSON IMPLEMENT COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2874. Complaint, Mar. 22, 1977 — Decision, Mar. 22, 1977

Consent order requring a Sampson, Ala., marketer of farming equipment, among other things, to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *H. Robert Ronick.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, as amended, and the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Acts, as amended, the Federal Trade Commission, having reason to believe that Bryson Implement Company, Inc., a corporation, and Herbert M. Bryson, Jr., individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and implementing regulation, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Bryson Implement Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its principal office and place of business located at Main Street, Samson, Alabama.

Respondent Herbert M. Bryson, Jr., is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of farming implements and equipment to members of the public.

PAR. 3. In the regular course and conduct of their business as

aforesaid, respondents regularly extend and arrange for the extension of credit to be used for agricultural purposes as defined in Section 226.2(e) of Regulation Z and therefore extend consumer credit, as "consumer credit" is defined in Section 226.2(p) of Regulation Z, the implementing regulation of the Truth in Lending Act, as amended, duly promulgated by the Board of Governors of the Federal Reserve Board.

PAR. 4. Subsequent to July 1, 1969, respondents, in the regular course of business as aforesaid and in connection with their credit sales, as "credit sale" is defined in Section 226.2(t) of Regulation Z, have caused, and are causing, customers to execute a binding document entitled as either "Installment Note," "Investment Note Agreement," "Note and Security Agreement" and/or "Retail Installment Contract," which documents are hereinafter referred to as the "contract." Respondents do not provide customers with any other credit cost disclosures.

PAR. 5. By and through the use of the contract, respondents, in many instances:

1. Fail to give to the customer all of the cost of credit information required by Section 226.8 of Regulation Z prior to the consummation of the sale, as required by Section 226.8(a) of Regulation Z;

2. Fail to disclose the finance charge expressed as an annual percentage rate, using the term "annual percentage rate," as required by Section 226.8(b)(2) of Regulation Z;

3. Fail to dislcose the sum of the payments scheduled to repay the indebtedness and to describe that sum as the "total of payments," as required by Section 226.8(b)(3) of Regulation Z;

4. Fail to disclose the amount, or method of computing the amount, of any default, delinquency or similar charges payable in the event of late payments, as required by Section 226.8(b)(4) of Regulation Z;

5. Fail, in conjunction with the description or identification of the type of any security interest held, retained or acquired, to clearly set forth such description on the same side of the page and above or adjacent to the place for the customer's signature on the contract or on one side of a separate statement which identifies the transaction, as required by Section 226.8(a)(1) and (2) of Regulation Z;

6. Fail, in conjunction with the description or identification of the type of any security interest held or to be retained or acquired, to clearly set forth that future indebtedness is secured by the property in which the security interest is retained, as required by Section 226.8(b)(5) of Regulation Z;

7. Fail to identify the method of computing any unearned portion

of the finance charge in the event of prepayment of the obligation, as required by Section 226.8(b)(7) of Regulation Z;

8. Fail to use the term "cash price" to describe the price at which respondents offer, in their regular course of business, to sell for cash the equipment which is the subject of the credit sale, as required by Section 226.8(c)(1) of Regulation Z;

9. Fail to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z;

10. Fail to use the term "trade-in" to describe any downpayment in property made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z;

11. Fail to use the term "total downpayment" to describe the sum of the "cash downpayment" and the "trade-in," as required by Section 226.8(c)(2) of Regulation Z;

12. Fail to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z;

13. Fail to disclose all other charges, individually itemized, which are included in the amount financed but which are not part of the finance charge, as required by Section 226.8(c)(4) of Regulation Z;

14. Fail to disclose the sum of the "unpaid balance of the cash price" and all other charges individually itemized which are included in the amount financed but which are not part of the finance charge, and to describe that sum as the "unpaid balance," as required by Section 226.8(c)(5) of Regulation Z;

15. Fail to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z;

16. Fail to use the term "finance charge" to describe the sum of all charges required by Section 226.4 of Regulation Z to be included therein, as required by Section 226.8(c)(8)(i) of Regulation Z;

17. Fail to disclose the sum of the cash price, all other charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(ii) of Regulation Z;

18. Fail to include in the finance charge charges or premiums for credit life, accident, health or loss of income insurance, written in connection with any credit transaction unless

(i) the insurance coverage is not required by the creditor and this fact is clearly and conspicuously disclosed in writing to the customer; and

(ii) any customer desiring such insurance coverage gives specifically dated and separately signed affirmative written indication of such desire after receiving written disclosure to him of the cost of such insurance, as required by Section 226.4(a)(5) of Regulation Z; and

19. Fail to include in the finance charge charges or premiums for insurance, written in connection with any credit transaction, against loss of or damage to property or against liability arising out of the ownership or use of property, unless a clear, conspicuous and specific statement in writing is furnished by the creditor to the customer setting forth the cost of the insurance if obtained from or through the creditor and stating that the customer may choose the person through which the insurance is to be obtained, as required by Section 226.4(a)(6) of Regulation Z.

PAR. 6. Respondents, in many instances, have failed to maintain evidence of compliance with Regulation Z for two (2) years after the date of each disclosure, as required by Section 226.6(i) of Regulation Z.

PAR. 7. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failure to comply with the provisions of Regulation Z constitutes violations of that Act and, pursuant to Section 108(c) thereof, respondents have thereby violated the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to submit to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, as amended, and the Federal Trade Commission Act, as amended; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents

have violated the said Acts, as amended, and the implementing regulation promulgated thereunder, as amended, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint making the following jurisdictional findings, and enters the following order:

1. Respondent Bryson Implement Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business located at Main St., Samson, Alabama.

Respondent Herbert M. Bryson, Jr. is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Bryson Implement Company, Inc., a corporation, its successors and assigns, and its officers, and Herbert M. Bryson, Jr., individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of, or arrangement to extend, consumer credit or any advertisement to aid, promote or assist, directly or indirectly, any extension of, or arrangement to extend, consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (15 U.S.C. 1601-65 (1970), as amended, 15 U.S.C. 1601-65(a), (Supp. IV, 1974)) do forthwith cease and desist from:

1. Failing to give to each customer all of the cost of credit information required by Section 226.8 of Regulation Z prior to the consummation of the sale, as required by Section 226.8(a) of Regulation Z;

2. Failing to disclose the finance charge expressed as an annual percentage rate, using the term "annual percentage rate," as required by Section 226.8(b)(2) of Regulation Z;

3. Failing to disclose the sum of the payments scheduled to repay

the indebtedness and to describe that sum as the "total of payments," as required by Section 226.8(b)(3) of Regulation Z;

4. Failing to disclose the amount, or method of computing the amount, of any default, delinquency or similar charges payable in the event of late payments, as required by Section 226.8(b)(4) of Regulation Z;

5. Failing, in conjunction with the description or identification of the type of any security interest held, retained or acquired, to clearly set forth such description on the same side of the page and above or adjacent to the place for the customer's signature on the contract or on one side of a separate statement which identifies the transaction, as required by Section 226.8(a)(1) and (2) of Regulation Z;

6. Failing, in conjunction with the description or identification of the type of any security interest held or to be retained or acquired, to clearly set forth that future indebtedness is secured by the property in which the security interest is retained, as required by Section 226.8(b)(5) of Regulation Z;

7. Failing to identify the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.8(b)(7) of Regulation Z;

8. Failing to use the term "cash price" to describe the price at which respondents offer, in their regular course of business, to sell for cash the equipment which is the subject of the credit sale, as required by Section 226.8(c)(1) of Regulation Z;

9. Failing to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z;

10. Failing to use the term "trade-in" to describe any downpayment in property made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z;

11. Failing to use the term "total downpayment" to describe the sum of the "cash downpayment" and the "trade-in," as required by Section 226.8(c)(2) of Regulation Z;

12. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z;

13. Failing to disclose all other charges, individually itemized, which are included in the amount financed but which are not part of the finance charge, as required by Section 226.8(c)(4) of Regulation Z;

14. Failing to disclose the sum of the "unpaid balance of the cash price" and all other charges individually itemized which are included in the amount financed but which are not part of the finance charge

and to describe that sum as the "unpaid balance," as required by Section 226.8(c)(5) of Regulation Z;

15. Failing to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z;

16. Failing to use the term "finance charge" to describe the sum of all charges required by Section 226.4 of Regulation Z to be included therein, as required by Section 226.8(c)(8)(i) of Regulation Z;

17. Failing to disclose the sum of the cash price, all other charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z;

18. Failing to include in the finance charge charges or premiums for credit life, accident, health or loss of income insurance, written in connection with any credit transaction unless

(i) the insurance coverage is not required by the creditor and this fact is clearly and conspicuously disclosed in writing to the customer; and

(ii) any customer desiring such insurance coverage gives specifically dated and separately signed affirmative written indication of such desire after receiving written disclosure to him of the cost of such insurance, as required by Section 226.4(a)(5) of Regulation Z;

19. Failing to include in the finance charge charges or premiums for insurance, written in connection with any credit transaction, against loss of or damage to property or against liability arising out of the ownership or use of property, unless a clear, conspicuous and specific statement in writing is furnished by the creditor to the customer setting forth the cost of the insurance if obtained from or through the creditor and stating that the customer may choose the person through which the insurance is to be obtained, as required by Section 226.4(a)(6) of Regulation Z;

20. Failing to maintain evidence of compliance with Regulation Z for two (2) years after the date of each disclosure, as required by Section 226.6(i) of Regulation Z; and

21. Failing in any consumer credit transaction or advertisement to make all disclosures that are required by Section 226.4, Section 226.5, Section 226.6, Section 226.8 and Section 226.10 of Regulation Z in the manner, form and amount specified therein.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present or future personnel of respondents engaged in the consummation of any extension of consumer credit or in any aspect of the preparation, creation or placing of advertising

and that respondents secure from each such person a signed statement acknowledging receipt of said order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten (10) years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

RICHARD D. JONES MORTGAGE SERVICES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2785. Complaint, Mar. 25, 1977 — Decision, Mar. 25, 1977

Consent order requiring a La Mesa, Calif., finance company, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such disclosures as are required by Federal Reserve System regulations.

Appearances

For the Commission: *Paul R. Roark.*

For the respondents: *Michael M. Anello, Wingert, Grebing & Anello,* San Diego, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Richard D. Jones Mortgage Services, Inc., a corporation, and Richard D. Jones, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Richard D. Jones Mortgage Services, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 8580 La Mesa Boulevard, La Mesa, Calif.

Respondent Richard D. Jones is an individual and an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in arranging for the extension of credit through the operation of a mortgage brokerage business, which generally arranges, for a fee, for investors to lend money to consumers using real property as security for the performance of the obligation arising out of the transaction.

PAR. 3. In the ordinary course and conduct of their business as aforesaid respondents regularly arrange for the extension of consumer credit or offer to extend or arrange for the extension of such credit as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, in the ordinary course and conduct of their business as aforesaid, respondents arrange for the extension of loans which are not a credit sale. In these transactions, respondents:

1. Fail to make the disclosures required by Section 226.8 of Regulation Z clearly, conspicuously and in meaningful sequence, as required by Section 226.6(a) of Regulation Z.

2. Fail to determine accurately the finance charge, by failing to include service, transaction, activity or carrying charges, loan fees, points, finder's fees or similar charges, as required by Section 226.4(a) of Regulation Z.

3. Fail to include in the finance charge fees for title examination, abstract of title, title insurance, preparation of deeds, settlement statements, other documents, appraisal fees and credit reports, in excess of reasonable amounts, as required by Section 226.4(e) of Regulation Z.

4. Fail to print the terms "annual percentage rate" and "finance charge" more conspicuously than other required terminology, as required by Section 226.6(a) of Regulation Z.

5. Disclose additional information or explanation stated, utilized and placed so as to mislead or confuse the customer and to contradict, obscure and detract attention from the information required to be disclosed by Section 226.8 of Regulation Z, as proscribed by Section 226.6(c) of Regulation Z.

6. Fail to preserve, for two years, evidence of compliance with the disclosure requirements of Regulation Z, other than the advertising requirement under Section 226.10, as required by Section 226.6(i) of Regulation Z.

7. Fail to make the disclosures required by Section 226.8 of

Regulation Z on either (1) the note or instrument evidencing the obligation on the same side of the page and above or adjacent to the place for the customer's signature; or (2) one side of a separate statement which identifies the transaction, as required by Section 226.8(a) of Regulation Z.

8. Fail to disclose the annual percentage rate accurately to the nearest quarter of one percent, computed in accordance with Section 226.5 of Regulation Z, using the term "annual percentage rate," as required by Section 226.8(b)(2) of Regulation Z.

9. Fail to disclose the due dates or periods of payment scheduled to repay the indebtedness as required by Section 226.8(b)(3) of Regulation Z.

10. Fail, in arranging for the extension of credit for loans secured by other than first liens or equivalent security interest on a dwelling made to finance the purchase of that dwelling, to disclose the sum of all the periodic payments and fail to use the term "total of payments" to describe said sum as required by Section 226.8(b)(3) of Regulation Z.

11. Fail, where a payment is more than twice the amount of an otherwise regularly scheduled equal payment, to identify the amount of such payment by using the term "balloon payment," as required by Section 226.8(b)(3) of Regulation Z.

12. Fail to disclose the amount, or method of computing the amount, of any default, delinquency or similar charges payable in the event of late payments, as required by Section 226.8(b)(4) of Regulation Z.

13. Fail to describe the penalty charge that may be imposed by the creditor or his assignee for prepayment of the principal of the obligation with an explanation of the method of computation of such penalty and the conditions under which it may be imposed, as required by Section 226.8(b)(6) of Regulation Z.

14. Fail to identify the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the customer, as required by Section 226.8(b)(7) of Regulation Z.

15. Fail to identify the amount of credit which will be paid to the customer or for his account or to another person on his behalf, including all charges, individually itemized, which are included in the amount of credit extended out which are not part of the finance

charge, using the term "amount financed," as required by Section 226.8(d)(1).

16. Fail to disclose, except in the case of a loan secured by a first lien or equivalent security interest on a dwelling and made to finance the purchase of that dwelling, the total amount of the finance charge using the term "finance charge," as required by Section 226.8(d)(3) of Regulation Z.

17. Fail, in the case of transactions in which a security interest is or will be retained or acquired in any real property which is used or expected to be used as the principal residence of the customer, except in the case of the creation, retention or assumption of a first lien or equivalent security interest as provided in Section 226.9(g) of Regulation Z, to:

a. disclose that the customer has a right to rescind the transaction by midnight of the third business day following the transaction, as required by Section 226.9 of Regulation Z;

b. set forth along with the notice contemplated by Section 226.9(b) of Regulation Z, Section 226.9(d) of Regulation Z, as required by Section 226.9(b) of Regulation Z; and

c. delay performance of respondents' obligations under contract until the rescission period has expired, as required by Section 226.9(c) of Regulation Z.

PAR. 5. By and through the acts and practices set forth above, respondents have failed and are now failing to comply with the requirements of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of the Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and of the Truth in Lending Act and the implementing regulation promulgated thereunder;

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts and implementing regulation, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Richard D. Jones Mortgage Services, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 8580 La Mesa Boulevard, La Mesa, Calif.

Respondent Richard D. Jones is an officer of said corporation. He formulates, directs and controls the policies, act and practices of said corporation, and his principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Richard D. Jones Mortgage Services, Inc., a corporation, its successors and assigns, and its officers, and Richard D. Jones, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other divice, in connection with any extension or arrangement for the extension of consumer credit, as "consumer credit" is defined in Regulation Z (12 C.F.R. 226) of the implementing regulation of the Truth in Lending Act, [15 U.S.C. 1601-1665 (1970), as amended, 15 U.S.C. 1601-1665(a), (Supp. IV, 1974)], do forthwith cease and desist from:

1. Failing to make the disclosures required by Section 226.8 of

Regulation Z clearly, conspicuously and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

2. Failing to include in the finance charge the service, transaction, activity or carrying charges, loan fees, points, finder's fees and similar charges as required by Section 226.4(a) of Regulation Z.

3. Failing to include in the finance charge fees for title examination, abstract of title, title insurance, preparation of deeds, settlement statements, other documents, appraisal fees and credit reports, in excess of reasonable amounts, as required by Section 226.4(e) of Regulation Z.

4. Failing to print the terms "annual percentage rate" and "finance charge" more conspicuously than other required terminology, as required by Section 226.6(a) of Regulation Z.

5. Disclosing additional information or explanation stated, utilized or so placed so as to mislead or confuse the customer or to contradict, obscure or detract attention from the information required to be disclosed by Section 226.8 of Regulation Z, including, but not limited to, setting forth any rate of interest or annual percentage rate in percentage terms which is not the true annual percentage rate required to be disclosed by Regulation Z and this order, as required by Section 226.6(c) of Regulation Z.

6. Failing to preserve, for two years, evidence of compliance with the disclosure requirements of Regulation Z, other than the advertising requirements under Section 226.10, as required by Section 226.6(i) of Regulation Z.

7. Failing to make the disclosures required by Section 226.8 of Regulation Z on either (1) the note or instrument evidencing the obligation on the same side of the page and above or adjacent to the place for the customer's signature; or (2) on one side of a separate statement which identifies the transaction, as required by Section 226.8(a) of Regulation Z.

8. Failing to disclose the annual percentage rate accurately to the nearest quarter of one percent, computed in accordance with Section 226.5 of Regulation Z, using the term "annual percentage rate," as required by Section 226.8(b)(2) of Regulation Z.

9. Failing to disclose the due dates or periods of payment scheduled to repay indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

10. Failing, in arranging for the extension of credit loans secured by other than a first lien or equivalent security interest on a dwelling made to finance the purchase of that dwelling, to disclose the sum of all payments and failing to use the term "total of payments" to describe said sum, as required by Section 226.8(b)(3) of Regulation Z.

11. Failing, in transactions where a payment is more than twice the amount of an otherwise regularly scheduled equal payment, to identify the amount of such payment by using the term "balloon payment," as required by Section 226.8(b)(3) of Regulation Z.

12. Failing to disclose the amount, or method of computing the amount, of any default, delinquency or similar charges payable in the event of late payments, as required by Section 226.8(b)(4) of Regulation Z.

13. Failing to describe the penalty charge that may be imposed by the creditor or his assignee for prepayment of the principal of the obligation with an explanation of the method of computing such penalty and the conditions under which it may be imposed, as required by Section 226.8(b)(6) of Regulation Z.

14. Failing to identify the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the obligation or refunded to the customer, as required by Section 226.8(b)(7) of Regulation Z.

15. Failing to identify the amount of the credit which will be paid to the customer or for his account or to another person on his behalf, including all charges, individually itemized, which are included in the amount of the credit extended but which are not part of the finance charge, using the term "amount financed," as required by Section 226.8(d)(1) of Regulation Z.

16. Failing to disclose, except in the case of a loan secured by a first lien or equivalent security interest on a dwelling and made to finance the purchase of that dwelling, the total amount of the finance charge, using the term "finance charge," as required by Section 226.8(d)(3) of Regulation Z.

17. Failing, in the case of a transaction in which a security interest is or will be retained or acquired in any real property which is used or expected to be used as the principal residence of the customer, except in the case of the creation, retention or assumption of a first lien or equivalent security interest, as set forth in Section 226.9(g) of Regulation Z, to:

a. Disclose that the customer has a right to rescind the transaction by midnight of the third business day following the transaction, as required by Section 226.9 of Regulation Z; and

b. Furnish the customer with two copies of the notice set forth at Section 226.9(b) of Regulation Z, as required by Section 226.9(b) of Regulation Z; and

c. Set forth, along with the notice contemplated and required by Section 226.9(b) of Regulation Z, Section 226.9(d) of Regulation Z, as required by Section 226.9(b) of Regulation Z; and

d. Delay performance of respondents' obligations under contract until the rescission period has expired, as required by Section 226.9(c) of Regulation Z.

18. Failing in any consumer credit transaction to make all disclosures determined in accordance with Section 226.4 and 226.5 of Regulation Z at the time and in the manner, form, and amount required by Sections 226.6, 226.8, and 226.9 of Regulation Z.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit or in any aspect of preparation, creation or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

It is further ordered, That the individual respondent named herein shall promptly notify the Commission of each change in his business or employment status, including discontinuance of his present business or employment, and each affiliation with a new business or employment for a period of ten years following the effective date of this order. Such notice shall include the address of the business or employment with which respondent is newly affiliated and a description of the business or employment as well as a description of the respondent's duties and responsibilities in that business or employment.

IN THE MATTER OF

NATIONAL MERIDIAN SERVICES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9027. Complaint, Mar. 25, 1975 — Decision, Mar. 28, 1977

Consent order requiring a Woodbury, N.Y., marketer of a basement waterproofing and termite control process, among other things to cease misrepresenting the size, extent and nature of its business; misrepresenting the qualifications and abilities of its employees; misrepresenting the effectiveness, performance, durability and uniqueness of its products and services. Further, respondents are required to maintain adequate records for a period of three years; make prescribed disclosures regarding limitations of their waterproofing; and respond to requests for maintenance or service within seven days. Additionally, the terms of the order require respondents to provide a three-day cooling-off period during which customers may cancel their contracts and receive prompt refunds of monies paid; maintain a reasonable customer relations department and institute a surveillance program designed to insure compliance with the provisions of the order.

Appearances

For the Commission: *Michael E. K. Mpras* and *Jerry W. Boykin.*

For the respondents: *Jack Lipson* and *Stephen Sacks, Arnold & Porter,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that National Meridian Services, Inc., a corporation, and Meridian Waterproofing Corporation, a corporation, and Michael C. Pascucci, individually and as an officer and director of said corporations, and Austin Royle, individually and as an officer of Meridian Waterproofing Corporation, and as an officer and director of National Meridian Services, Inc., have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PAR. 1. Respondent National Meridian Services, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 151 East Jericho Turnpike, Mineola, New York.

Said respondent controls and dominates the acts and practices of

respondent Meridian Waterproofing Corporation, a wholly-owned subsidiary, which is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 151 East Jericho Turnpike, Mineola, New York.

Respondent Michael C. Pascucci is an officer and director of the corporate respondents. Respondent Austin Royle is an officer of the corporate respondents and director of respondent National Meridian Services, Inc. They formulate, direct and control the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

All of the aforementioned respondents cooperate and act together in the carrying out of the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, and sale of residential and commercial waterproofing and related termite control products and services to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, services, advertising and promotional material, contracts and other business papers and documents to be shipped and transmitted to, from and among their several places of business located in various states of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of their business, as aforesaid, for the purpose of obtaining leads or prospects for the sale of basement waterproofing and related termite control products and services and for the purpose of inducing the purchase of their products and services, respondents and their employees, salesmen, servicemen and representatives, cause prospective purchasers of their basement waterproofing and related termite control products and services who have answered respondents' advertisements to be interviewed by salesmen at the place of residence of individual prospective purchasers. Said salesmen endeavor to sell respondents' basement waterproofing and related termite control products and services, and for the purpose of inducing the sale of said products and services, said salesmen have made numerous statements and representations, directly or by implication, orally, by means of brochures or other printed material displayed by salesmen to prospective purchasers, and through television and newspaper advertisements, respecting

the nature of their offer and their business, price, time limitations, their guarantee, and the quality of their products and services.

Typical and illustrative of respondents' published advertising and representations, but not all-inclusive thereof, are the following:

Now Meridian, the Nationwide Home Service, will solve your basement problems at a truly amazing Low Cost, WITHOUT DIGGING, INCLUDING AN ALL STEEL SYSTEM, AND SPECIFY THE RESULTS IN WRITING. No job too small. No damage to shrubs or driveway.

MERIDIAN - THE NATION'S LARGEST - roof to basement waterproofing company.

LEAKY BASEMENT? Don't mop it - stop it -Send today for FREE U.S. GOV'T. BULLETIN & EASY DO-IT-YOURSELF HINTS. Learn how to solve leaky basement problems.

Meridian can waterproof any and all water seepage problems - WILL STOP THAT LEAKY BASEMENT ONCE AND FOR ALL.

MERIDIAN STANDS BY ITS WORK WITH A WRITTEN GUARANTEE.

A Meridian Exclusive!

Another Exclusive!

Continued, Guaranteed Protection

Your Problem Solved

No Inconvenience, Done Quickly

Quality Materials

Expert Workmanship

Life Time Protection

Only Recognized Waterproofing And Termite Control In One Application!

Total Foundation Protection

We Must Satisfy You

Termites - Quietly and Unseen Attack Inside - Outside - Underneath * * * No Home Is Safe From Termites Unless It's Treated.

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import and meaning but not expressly set out herein, and through oral statements and representations made by their agents and representatives, the respondents have represented, and are now representing, directly or by implication, that:

1. Respondents' methods of basement waterproofing and related termite control are an exclusive process; and that respondents use a unique method of combined waterproofing and termite control application.

2. Respondents are the nation's largest waterproofing company and have offices from coast to coast.

3. Respondents have received praise and acclaim for their waterproofing and termite control services, from, among other publications, *The New York Times, Better Homes and Gardens, Popular Science,* and the *Sunday News* (New York).

4. A purchaser dealing with respondents can be sure of carefully inspected and carefully performed quality workmanship.

5. Respondents will provide prompt service, where needed, following completion of any waterproofing or related termite control job.

6. Respondents' method of combining termite control with their waterproofing service provides homeowners with a complete termite service and complete termite barrier or shield, and that such termite barrier or shield is permanent.

7. Respondents' representatives and employees have the training, experience, ability, or equipment to waterproof leaky basements completely and to keep them dry permanently.

8. Respondents' waterproofing and termite control services are guaranteed.

9. Respondents' method of waterproofing will waterproof basements without digging and without causing damage to shrubs, driveways, walls, floors or foundations.

10. Respondents will mail any homeowner who so requests waterproofing bulletins that will provide him with enough information to waterproof his leaky basement without professional assistance.

11. The pumping of bentonite or the chemical substance $Na_4 SO_4 + CaCl_2 + H_2O$, trade named "Meridian Seal", around the basement foundation walls is a completely effective or permanent method of basement waterproofing.

12. The homes of prospective purchasers of waterproofing or termite control services are in immediate danger of serious termite or water damage.

13. Complete termite control treatment or protection is included in the basement waterproofing service.

14. Respondents' services are being offered for sale at special or reduced prices and that savings are thereby offered to purchasers from respondents' regular selling prices.

15. Respondents' services are designed to render basements impermeable to water and moisture.

PAR. 6. In truth and in fact:

1. Respondents' methods of basement waterproofing and related termite control are not exclusive or unique but have been and are utilized by other competing basement waterproofing companies.

2. Respondents are not the nation's largest waterproofing company and do not have offices from coast to coast.

3. Respondents have not received praise and acclaim for their waterproofing and related termite control services from any publications, and specifically not from *The New York Times, Better Homes and Gardens, Popular Science,* or the *Sunday News* (New York).

4. A purchaser dealing with respondents cannot be sure of carefully inspected and carefully performed quality workmanship. Further, services offered by respondents have, in many instances, been performed in a manner indicating lack of skill or training, incompetence or indifference, and have, in many instances, been of poor quality.

5. Respondents do not, in many instances, provide prompt service to their customers following completion of any waterproofing or related termite control job but, in many cases, respondents' customers wait for weeks or months before any such service is rendered.

6. Respondents' method of combining termite control with their waterproofing service does not provide homeowners with a complete termite service and complete termite barrier or shield, and such termite proofing is not permanent. In fact, in many cases, respondents' representatives and employees lack the training and experience to inspect, diagnose, or treat the existence of termites in a home.

7. Respondents' representatives and employees are not trained, experienced, able or equipped to waterproof leaky basements completely or permanently, but are, in many instances, engaged in diverting water, once it has penetrated into the basement, out of the basement walls and floors.

8. Respondents have failed, in many instances, to provide the servicing obligations which they agreed to provide under their basement waterproofing contracts and guarantees. Further, representations of guarantee have been made without setting forth the extent and nature of the guarantee, and the manner in which the guarantor will perform thereunder.

9. Respondents' method of waterproofing, has, in many instances, caused damage to shrubs, driveways, walls, floors or foundations.

10. Respondents in a number of instances, have failed to mail to homeowners who so request waterproofing or termite control bulle-

tins but sent instead a Meridian salesman; and such bulletins, when mailed, do not, in many instances, provide enough information to enable homeowners to waterproof or termite proof their leaky basements without professional assistance. Further, such bulletins are used by respondents to obtain leads in selling their waterproofing and termite control services.

11. The pumping of bentonite or the chemical substance $Na_4 SO_4 + CaCl_2 + H_2O$, trade named "Meridian Seal," around the basement foundation walls is neither a completely effective nor a permanent method of basement waterproofing. Further, soil conditions and the water table affect such substances to the extent that it is difficult to predict when such substances can be effective sealants without ascertaining the level of the water table and the type of soil conditions surrounding the basement walls.

12. In many cases, the homes of prospective purchasers of waterproofing or related termite control services are in no immediate danger of serious water or termite damage.

13. Complete termite control treatment protection is often not provided with respondents' basement waterproofing service.

14. Respondents' services are often not being offered for sale at special or reduced prices and savings are not thereby afforded purchasers because of reductions from respondents' regular selling prices. In fact, the prices at which respondents' services are sold often vary from customer to customer, depending on the resistance of the prospective purchaser.

15. Respondents' services are, in many instances, not designed to render basements impermeable to water and moisture, but rather such services are designed to divert water out of the basement floors and walls by means of sump pumps, cove plates and other methods once the water has penetrated the basement walls or floors.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business and in the furtherance of their purpose of inducing prospective customers to execute contracts for their waterproofing and related termite control products and services, respondents and their employees, salesmen, and representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

In a substantial number of instances, through the use of false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Six, above, respon-

dents or their representatives have been able to induce customers into signing a contract upon initial contact without giving the customer sufficient time to carefully consider the purchase and consequences thereof.

PAR. 8. In the further course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their waterproofing and related termite control products and services, respondents have engaged in the following additional unfair and false, misleading and deceptive acts and practices:

In a substantial number of instances and in the usual course of their business, respondents sell and transfer their customers' obligations, procured by the aforesaid unfair, false, misleading and deceptive means, to various financial institutions. In any subsequent legal action to collect on such obligations, these financial institutions or other third parties, as a general rule, have available and can interpose various defenses which may cut off certain valid claims customers may have against respondents for failure to perform or for certain other unfair, false, misleading and deceptive acts and practices.

PAR. 9. In the course and conduct of their business, as aforesaid, respondents have been, and now are, in substantial competition, in or affecting commerce, with corporations, firms and individuals in the sale of basement waterproofing and termite control products and services of the same general kind and nature as those sold by respondents.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices and the failure to disclose material facts, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements and representations were, and are, true and complete, and into the purchase of respondents' products and services by reason of said erroneous and mistaken belief. Respondents' aforesaid acts and practices unfairly cause the purchasing public to assume debts and obligations and to make payments of money which they might otherwise not have incurred.

PAR. 11. The acts and practices of the respondents as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or

deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having issued a complaint charging that the respondents named in the caption hereof have violated the provisions of the Federal Trade Commission Act; and

The Commission having duly determined upon motion submitted by respondents that, in the circumstances presented, the public interest would be served by a withdrawal of the matter from adjudication for the purpose of negotiating a settlement by the entry of a consent order; and

The respondents and counsel for the Commission having executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing a consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedures described in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

Respondent National Meridian Services, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 175 Crossways Park West, Woodbury, New York.

Respondent Meridian Waterproofing Corporation, a wholly-owned subsidiary of National Meridian Services, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 175 Crossways Park West, Woodbury, New York.

Respondent Michael C. Pascucci is an officer and director of the corporate respondents. Respondent Austin Royle is an officer of the corporate respondents and a director of respondent National Meridian Services, Inc. They formulate, direct and control the acts and practices of the corporate respondents. Their address is the same as that of the corporate respondents.

The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

A. *It is ordered,* That respondents National Meridian Services, Inc., a corporation, Meridian Waterproofing Corporation, a corporation, their successors and assigns, and their officers and directors, and Michael C. Pascucci, individually and as an officer and director of said corporations, and Austin Royle, individually and as an officer of Meridian Waterproofing Corporation, and as an officer and director of National Meridian Services, Inc., and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale or distribution of residential and commercial waterproofing and related termite control products or services, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, orally or in writing, that respondents employ an exclusive or unique process in their basement waterproofing or related termite control business.

2. Representing, directly or by implication, orally or in writing, that respondents are the nation's largest waterproofing company, or that respondents have offices from coast to coast, unless such are facts, or otherwise misrepresenting in any manner the size, extent or nature of respondents' business.

3. Representing, directly or by implication, orally or in writing, that respondents are the recipients of praise, acclaim or approval for their waterproofing or related termite control process or services from *The New York Times, Better Homes and Gardens, Popular Science,* and the *Sunday News* (New York), or otherwise misrepresenting, in any manner, that respondents are the recipients of praise, acclaim or approval from any publication, organization or person.

4. Failing to disclose, clearly and conspicuously in all advertising, that respondents do not, in many instances, provide prompt service to their customers following completion of any waterproofing or related termite control work, but, in many instances, keep their customers waiting for weeks or months before any such service is rendered; *provided,* that the foregoing disclosure will not be required so long as respondents:

(a) Maintain an address and telephone number to which customers

may direct complaints or requests for repair work, contract adjustments, or correction of faulty products or services;

(b) Furnish each customer at the time of sale of any waterproofing or related termite control services the address and telephone number to which such complaints or requests may be directed; and

(c) Respond to such complaints and requests within seven (7) days from the date of receipt thereof from past purchasers of respondents' waterproofing and related termite control services.

5. Failing to maintain (a) adequate records which disclose the date and nature of all service calls, the date and nature of all demands for refunds made by respondents' customers, the date, amount and reason for any refunds given to respondents' customers, and related documents in connection with the implementation of Paragraph 4(a), (b) and (c), and (b) sample copies of each type of advertisement, including newspaper, radio and television advertisements, direct mail solicitation literature, and any promotional material utilized for the purpose of obtaining leads for the sale of waterproofing or related termite control products and services.

6. Using the words "permanently" or "completely," or other words or phrases of similar import or meaning, to describe respondents' basement waterproofing or related termite control process or services; representing, in any manner, that respondents have the training, experience or ability to waterproof leaky basements completely or to keep them dry permanently.

7. Representing, directly or by implication, orally or in writing, that a basement can be waterproofed without digging, or without damage to shrubs, driveways, walls, floors or foundations.

8. Failing to mail to any homeowner who so requests the waterproofing and termite control bulletins so advertised by respondents; and failing to disclose clearly and conspicuously in each advertisement wherein such bulletins are mentioned the following notice set off from the text of the advertisement by a black border:

> The purpose of this solicitation is to obtain your name and address so that a Meridian salesman may call upon you. Such waterproofing and termite control bulletins do not provide sufficient information to enable you to waterproof or termite proof your basement without professional assistance.

9. Using in any manner, a sales plan, scheme or device wherein false, misleading or deceptive statements and representations are made, orally or in writing, directly or by implication, in order to obtain leads or prospects for, or to induce, the sale of goods and services.

10. Making any claim or representation, orally or in writing,

relating to the efficacy or performance of respondents' waterproofing or related termite control process or services unless, at the time such claim or representation is made, respondents have a reasonable basis for such claim or representation.

11. Failing to maintain accurate records which may be inspected and copied by Commission staff members upon ten (10) days notice:

(a) Which consist of documentation to support any and all claims made after the effective date of this order in advertising or sales promotion material concerning the efficacy and performance characteristics of any waterproofing or related termite control process of services marketed by the respondents.

(b) Which provided the basis upon which respondents relied as of the time those claims were made; and

(c) Which shall be maintained by respondents for a period of three years from the date such advertising or sales promotion material was last disseminated.

12. Misrepresenting, in any manner, the education, training or experience of any of respondents' employees.

13. Representing, directly or by implication, orally or in writing, that any of respondents' waterproofing or related termite control products or services are guaranteed, unless the nature, extent, and duration of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed in any advertisements, brochures, contracts or other printed materials wherein the terms "guarantee" or "warranty" are used, and orally, prior to the signing of any contract, and unless the guarantor will, in fact, perform as stated in the disclosed guarantee.

14. Representing, directly or by implication, orally or in writing, that respondents' method of pumping bentonite or the chemical substance $Na_4 SO_4 + CaCl_2 + H_2O$, trade named "Meridian Seal," or any other substantially similar substance, is a completely effective or permanent method of basement waterproofing. Misrepresenting, in any manner, the efficacy of bentonite or "Meridian Seal."

15. Inducing the sale of waterproofing or termite control services, or any other product or service, by employing "scare tactics" to create an exaggerated impression of the risk of serious termite, water, or other damage or injury, or the immediacy of such risk, or misrepresenting in any manner the nature and extent of the threat that water leakage or termites present to property.

16. Representing, directly or by implication, orally or in writing, that any price for waterproofing or related termite control products

or services is a special or reduced price from the price respondents normally charge, unless (a) respondents have made bona fide sales at a higher reference price in the recent past; (b) the reference price is the immediately preceding price or is disclosed to be otherwise; and (c) either the reference price, the dollar savings computed therefrom, or the percentage savings computed therefrom is disclosed.

17. Contracting for any sale of basement waterproofing or related termite control products or services in the form of a sales contract or other agreement which shall become binding on the buyer prior to midnight of the third business day, excluding Sundays and legal holidays, after the date of execution of the contract or other agreements.

18. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in boldface type of a minimum size of 10 points, a statement in substantially the following form:

> YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

19. Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain in 10-point boldface type the following information and statements in the same language, e.g., Spanish, as that used in the contract:

> NOTICE OF CANCELLATION
>
> [enter date of transaction]
>
> (date)
>
> YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.
>
> TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [*name of seller*] AT [*address of seller's place of business*], NOT LATER THAN MIDNIGHT OF *(Date)*.

I HEREBY CANCEL THIS TRANSACTION.

_____

(Date)

_____

(Buyer's signature)

20. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

21. Failing or refusing to honor any valid notice of cancellation by a buyer and within fifteen (15) business days after the receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale.

22. Failing to disclose, orally prior to the time of sale and in writing on any trade acceptance, conditional sales contract, promissory note, or other instrument of indebtedness executed by the purchaser, with such conspicuousness and clarity as is likely to be observed and read by such purchaser:

(a) The disclosures, if any, required by Federal law or the law of the state in which the instrument is executed;

(b) Where negotiation of the instrument to a third party is not prohibited by the law of the state in which the instrument is executed, that the trade acceptance, conditional sales contract, promissory note or other instrument may, at the option of the seller and without notice to the purchaser, be negotiated or assigned to a finance company or other third party.

23. (a) Failing to disclose in writing on the face of every contract for the pressure pumping process, in bold print, on an easily detachable form which shall be executed by the customer and retained by the seller and orally, prior to the signing of any such contract, and in ten point bold face type in all advertisements, promotional materials and similar documents for such process, the following notice:

> MERIDIAN PROVIDES TWO KINDS OF WATERPROOFING SERVICES: CHANNELING WATER AWAY FROM THE BASEMENT AND PRESSURE PUMPING A BENTONITE MIXTURE AGAINST WALLS AND FOOTINGS. THE BENTONITE MATERIAL USED IN THE PRESSURE PUMPING PROCESS WILL NOT PREVENT LEAKS IN YOUR BASEMENT UNDER CERTAIN TYPES OF SOIL AND WATER TABLE CONDITIONS. IF YOU HAVE NOT HAD ENGINEERING TESTS CONDUCTED ON YOUR PROPERTY BY A QUALIFIED ENGINEER, YOU CANNOT BE SURE THE PROCESS YOU HAVE CONTRACTED FOR WILL WORK ON YOUR HOME.

(b) Failing to disclose in radio and other electronic media advertisements for the pressure pumping process the following notice:

> THE BENTONITE MATERIAL USED IN THE PRESSURE PUMPING PROCESS WILL NOT PREVENT LEAKS IN YOUR BASEMENT UNDER CERTAIN TYPES OF SOIL AND WATER TABLE CONDITIONS. IF YOU HAVE NOT HAD ENGINEERING TESTS CONDUCTED ON YOUR PROPERTY BY A QUALIFIED ENGINEER, YOU CANNOT BE SURE THIS PROCESS WILL WORK.

B. *It is further ordered,* That respondents:

1. Deliver a copy of this order to cease and desist to all present and future employees, salesmen, agents, independent contractors, or other representatives engaged in (a) the offering for sale, sale, or servicing of any of its waterproofing or related termite control products and services, or (b) any aspect of preparation, creation, or placing of advertising, and secure a signed statement acknowledging receipt of that order from each such person.

2. Inform all recipients of this order pursuant to subsection 1. above that respondents are obligated by the order to discontinue dealing with any person who commits acts or practices prohibited by it.

3. Institute a program of continuing surveillance to reveal whether respondents' employees, salesmen, agents, independent contractors or other representatives are engaging in acts or practices which violate this order.

4. Discontinue dealing with or terminate the use or engagement of any person described in paragraph 1 above, as revealed by the aforesaid program of surveillance, who continues on his own any act or practice prohibited by this order.

5. Maintain complete records for a period of no less than three years from the date of the incident, of any written or oral information received which indicates the possibility of a violation of this order by any employee, salesmen, agent, independent contractor or other representative; and to maintain complete records of terminations as required by subparagraph 4 of this paragraph. Any oral information received indicating the possibility of a violation of this order shall be reduced to writing, and shall include the name, address and telephone number of the informant, the name and address of the individual involved, the date of communication and a brief summary of the information received. Such records shall be available upon request to representatives of the Federal Trade Commission during normal business hours upon reasonable advance notice.

6. That respondents, for a period of one (1) year from the effective date of this order, provide each advertising agency utilized by

respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale of waterproofing or related termite control products and services, with a copy of the Commission's News Release setting forth the terms of this order.

II

It is further ordered:

A. That respondents notify the Commission at least thirty (30) days prior to any proposed change in any of the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

B. That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

C. That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

BORDEN, INC.

Docket 8978. Interlocutory Order, Apr. 5, 1977

Order granting motion by Department of Commerce to file brief as *amicus curiae;* accepting brief as filed; and granting counsel 30 days to file responsive briefs.

ORDER

On March 8, 1977, the United States Department of Commerce moved for leave to file a brief as *amicus curiae* in this appeal. The Department's brief was conditionally filed therewith. Complaint counsel and counsel for respondent Borden, Inc. have informally indicated to the Office of the Secretary that they do not intend to file in opposition to the motion.

While the Commission's Rules of Practice do not expressly provide for the filing of *amicus curiae* briefs, we have granted *amicus* treatment to certain filings under section 3.14, which governs intervention in Commission proceedings. See, *e.g., Corning Glass Works,* 82 F.T.C. 1082 (March 22, 1973). Section 3.14 is broadly drafted, providing for orders permitting intervention "to such extent and upon such terms as are provided by law or as otherwise may be deemed proper."

A motion for leave to file a brief *amicus curiae* addresses the discretion of the tribunal. As the term itself and the tradition from which it arises make clear, the role of the *amicus* is not to vindicate its own rights but to clarify for the tribunal the broad implications of the question before it. The brief of the Department of Commerce fits squarely within this role.

It would obviously have been preferable to receive this motion and brief at an earlier stage of the appeal.[1] At this point, all briefs have been filed and oral argument heard. Absent special circumstances, leave to file at this point might well be denied to avoid the disruption and possible delay attendant on granting it. In the present instance, however, the importance of the issue involved and the uniqueness of the Department's perspective outweigh these considerations.

It is therefore ordered, That the motion for leave to file a brief as *amicus curiae* be granted, that the brief be accepted as filed, and that complaint counsel and counsel for respondent Borden, Inc., have thirty days to file responsive briefs, if they so desire.

[1] The U.S. Courts of Appeals, by way of analogy, require generally that an *amicus* brief be filed no later than that of the party the brief will support. Rule 29, Federal Rules of Appellate Procedure.

IN THE MATTER OF

THE RAYMOND LEE ORGANIZATION, INC., ET AL.

Docket 9045. Interlocutory Order, Apr. 5, 1977

Order determing that record does not establish any violations of the code of professional responsibility.

ORDER

The administrative law judge has certified to the Commission certain allegations made by respondents that complaint counsel and other Commission personnel have made improper statements concerning respondents and other members of the idea promotion industry. The Commission, of course, expects counsel appearing before this agency to comply with Disciplinary Rule 7-107 (H).[1]

The Commission has determined that only the alleged comments made by counsel of record ought to be considered in the context of this adjudicative proceeding. The Commission has also determined that the record does not establish any violations of the Code of Professional Responsibility.

It is so ordered.

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[1] The rule provides that during the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to: (1) Evidence regarding the occurrence or transaction involved. (2) The character, credibility, or criminal record of a party, witness, or prospective witness. (3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such. (4) His opinion as to the merits of the claims, defenses, or positions of an interested person. (5) Any other matter reasonably likely to interfere with a fair hearing.

IN THE MATTER OF

GENERAL ELECTRIC COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9049. Complaint, July 29, 1975 — Decision, Apr. 7, 1977

Consent order requiring a Fairfield, Conn., manufacturer of television sets and other electrical household appliances, among other things, to cease misrepresenting the comparative superiority, special features and reliability of their products through use of unsubstantiated advertising claims.

Appearances

For the Commission: *Walter B. Fisherow* and *James H. Skiles.*

For the respondent: *James Bruce,* Fairfield, Conn. and *White & Case,* New York City and Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that General Electric Company, a corporation hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent General Electric Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 3135 Easton Turnpike, Fairfield, Connecticut.

PAR. 2. Respondent General Electric Company is now and for some time past, has been engaged in the production, advertising, and sale of consumer electronic products, including color television receivers, which when sold are shipped to purchasers located in various States of the United States. Thus respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said consumer electronic products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

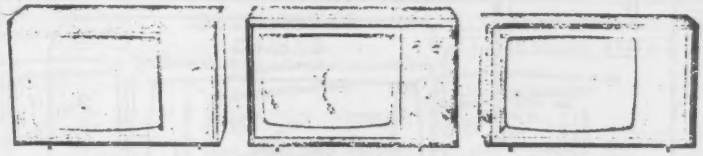
PAR. 3. Respondent General Electric Company at all times mentioned herein has been, and now is, in substantial competition in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, with individuals, firms and corporations engaged in

the sale and distribution of consumer electronic products of the same general kind and nature as those produced and sold by respondent.

PAR. 4. In the course and conduct of its said business, respondent General Electric Company has disseminated or caused the dissemination of, certain advertisements concerning the said products by the United States mail and by various means in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products, and has disseminated and caused the dissemination of advertisements concerning said products by various means for the purpose of inducing and which is likely to induce, directly, or indirectly, the purchase of said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Typical of the representations and statements contained in said advertisements, disseminated as aforesaid, but not all inclusive thereof, are the following print advertisements which have been reproduced, attached to this complaint, and made a part hereof:

WHICH COLOR TV REQUIRED LESS SERVICE IN 1973?



RCA GENERAL ELECTRIC ZENITH

In 1973, independent surveys* of recent color TV buyers showed that General Electric color required less service than any other U.S. brand. Not merely an opinion poll, this was a survey of actual TV owners. People like you, who expect the most in reliable TV performance for their money.

To get the kind of picture you expect for your money, go into a store and compare pictures. Ours against any other set.

The best way we know to buy color TV is to compare performance.

To help you compare, get GE's booklet, "How to Buy Color TV in Plain English." For the store nearest you, where you can pick it up free, call this special toll-free number anytime. 800-243-6000. Dial as you normally dial long distance. (In Connecticut, call 1-800-882-6500.)

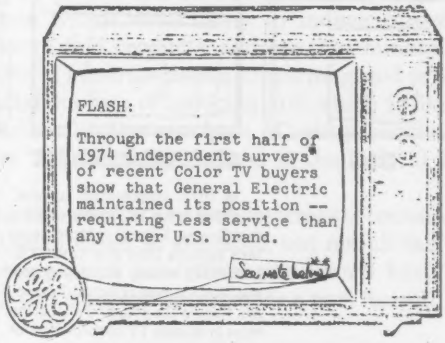
GENERAL ELECTRIC

*Details available on request

US. News 10/7/74.

Exhibit 122

BEFORE YOU BUY COLOR TV, CONSIDER GE'S RECORD FOR RELIABILITY.


FLASH:
Through the first half of 1974 independent surveys* of recent Color TV buyers show that General Electric maintained its position -- requiring less service than any other U.S. brand.
See note below

PERFORMANCE TELEVISION

Reassure yourself. This survey quoted above wasn't merely an opinion poll, but an independent survey based on hard facts reported by actual TV owners. *Details available upon request.

Compare picture quality, too. Thanks to GE's 100% Solid State chassis and the Black Matrix picture tube, you'll see brilliance and crispness of detail that will stack up against anyone's. Reliability, superb picture... add up to GE Performance Television.

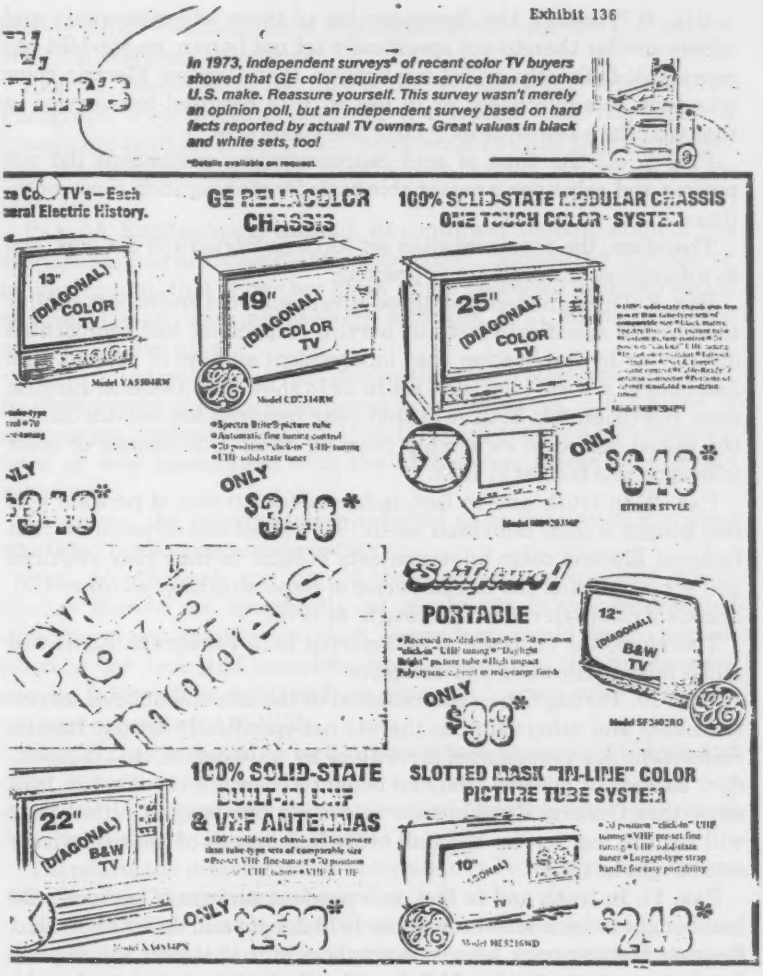
Come see the GE Performance Television line and get your free copy of "How to Buy Color TV. In Plain English!"

CALL THIS TOLL FREE NUMBER
800-243-3000
FOR THE NAME OF YOUR NEAREST
GE PERFORMANCE COLOR TV DEALER

THE PITTSBURGH PRESS

** Due to poor reproduction, staff has typed-in the message within the TV screen.
W.J. 6/9/75

Exhibit 136


In 1973, independent surveys* of recent color TV buyers showed that GE color required less service than any other U.S. make. Reassure yourself. This survey wasn't merely an opinion poll, but an independent survey based on hard facts reported by actual TV owners. Great values in black and white sets, too!
*Details available on request.
GE RELIACOLOR CHASSIS
100% SOLID-STATE MODULAR CHASSIS ONE TOUCH COLOR SYSTEM
13" (DIAGONAL) COLOR TV
19" (DIAGONAL) COLOR TV
25" (DIAGONAL) COLOR TV
ONLY $348*
ONLY $648*
EITHER STYLE
Self-serve!
PORTABLE
12" (DIAGONAL) B&W TV
ONLY $98*
22" (DIAGONAL) B&W TV
100% SOLID-STATE BUILT-IN UHF & VHF ANTENNAS
SLOTTED MASK "IN-LINE" COLOR PICTURE TUBE SYSTEM
10" (DIAGONAL) TV
ONLY $243*

Comm't 2: "National Sales Days" Holland — General use Atlanta, Ga. Item #1

PAR. 6. Through the dissemination of these advertisements and others similar thereto not specifically set out herein, respondent has represented directly or by implication that General Electric color television sets purchased or in use in 1973 required less service in that year than Zenith or RCA color television sets.

PAR. 7. At the time of said representation, respondent did not possess and rely upon a reasonable basis for making such representation.

Therefore, the representation set forth in Paragraph Six was, and is, a deceptive or unfair act or practice.

PAR. 8. Through the use of these advertisements and others similar thereto not specifically set out herein, respondent had represented directly or by implication that independent surveys of persons who had bought a color television set in 1973 show that General Electric color television sets bought in that year required less service during the initial period of ownership than all other U.S. brands of color television sets bought in 1973.

PAR. 9. In truth and in fact, independent surveys of persons who had bought a color television set in 1973 did not and do not show that General Electric color television sets bought in that year required less service during the initial period of ownership than all other U.S. brands of color television sets bought in 1973.

Therefore, the representation referred to in Paragraph Eight was and is false, misleading and deceptive.

PAR. 10. Through the dissemination of the aforementioned advertisements and others similar thereto not specifically set out herein, respondent has represented directly or by implication, that independent surveys of persons who had bought a color television set in 1973 show that General Electric color television sets bought in that year will require less service than all other U.S. brands of color television sets bought in 1973.

PAR. 11. In truth and in fact, independent surveys of persons who had bought a color television set in 1973 did not and do not show that General Electric color television sets bought in that year will require less service than all other U.S. brands of color television sets bought in 1973.

Therefore, the representation referred to in Paragraph Ten was and is false, misleading and deceptive.

PAR. 12. Respondent continued to disseminate the aforementioned advertisements, representing that 1973 survey evidence of service levels of General Electric color television sets is a reason to purchase such sets in 1974/75, when respondent knew of and had available to it subsequently acquired evidence of a substantially identical type and

quality which contradicted or was inconsistent with the 1973 survey evidence expressly relied upon.

PAR. 13. Therefore, at the time of the representation referred to in Paragraph Twelve respondent did not possess and rely upon a reasonable basis for making such representation, and the representation set forth in Paragraph Twelve was, and is, an unfair act or practice.

PAR. 14. Furthermore, through its continued dissemination of the aforementioned advertisements, respondent represented, directly or by implication, that it neither knew of nor possessed evidence which contradicted or was inconsistent with the 1973 survey evidence expressly relied upon.

PAR. 15. In truth and in fact, during the time respondent continued to disseminate the aforementioned advertisements, it did know of and possess evidence of an identical type and quality which contradicted or was inconsistent with the 1973 survey evidence expressly relied upon.

Therefore, the representation referred to in Paragraph Fourteen was false, misleading and deceptive.

PAR. 16. Through the use of these advertisements and others similar thereto not specifically set out herein, it was represented directly or by implication that respondent would upon request forward the true and complete details regarding the comparative service information obtained from surveys of recent color television set buyers conducted in 1973.

PAR. 17. In truth and in fact, upon request respondent did not and does not forward the true and complete details regarding the comparative service information obtained from the surveys of recent color television set buyers conducted in 1973.

Therefore, the representation referred to in Paragraph Sixteen was false, misleading and deceptive.

PAR. 18. The use by the respondent of the aforesaid false, misleading, deceptive or unfair statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 19. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute, unfair and deceptive acts and practices and unfair methods of

competition, in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission issued, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(c) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent General Electric Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and a principal place of business located at 3135 Easton Turnpike, Fairfield, Connecticut.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent General Electric Company, a corporation, its successors and assigns, either jointly or individually, and respondent's officers, representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, distribution or sale of any and all of the following household products manufactured or marketed by respondent: monochrome (*i.e.,* black

and white) television receivers, color television receivers, clothes washers, clothes dryers, ranges, dishwashers, trash compactors, refrigerators, freezers, room air conditioners, stereophonic consoles and nonportable stereophonic sound systems and components (any or all of which products are hereafter referred to in this Part I as "such product(s)"), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Advertising or offering such product(s) for sale by referring to any test, experiment, demonstration, study or survey, or any or all of the results thereof (hereafter "evidence"), which evidence is represented, either directly or by implication, as supporting, showing or proving:

(1) the existence or nature of any fact or product feature respecting such product(s) when such evidence does not support, show or prove such fact or product feature;

(2) that such product(s) is superior to any or all competing products in any respect unless such evidence supports, shows or proves that such product(s) is superior in each respect in which it is represented to be superior, and respondent either:

(a) identifies the particular aspect of such superiority and discloses the nature or extent of such superiority in terms reasonably understandable to the class of persons to whom the representation is directed (*e.g.*, consumers, dealers or others); or

(b) has a reasonable basis for concluding that, in connection with the possession or use of such product(s), the nature or extent of such superiority will be discernible to or of benefit to the class of persons to whom the representation is directed:

(3) that any representation about such product(s) or any competing product applies to each type or model of such product(s) or competing product, when the evidence does not support, show or prove the application of such representation to each type or model of such product(s) or such competing product referred to, either directly or by implication;

(4) that such product(s) requires less service or has any other superior service characteristic when compared to any or all competing products unless the evidence at the time such representation is made supports, shows or proves such representation and:

(a) respondent clearly and conspicuously discloses the particular aspect of such product's(s') superior service characteristic which such evidence supports, shows or proves; or

(b) if respondent represents that such product(s) requires less service and such evidence supports, shows or proves that such product(s)

requires both less frequent and less costly service, then respondent need not make the disclosure required by this subparagraph (4);

or:

(5) that such product(s) is more dependable or more reliable when compared to any or all competing products unless the evidence at the time such representation is made supports, shows or proves such representation and respondent clearly and conspicuously discloses the particular aspect of such product's(s') greater dependability or reliability which such evidence supports, shows or proves.

B. Advertising or offering such product(s) for sale by referring to evidence to support, show or prove any representation covered by Paragraph A of Part I when such evidence is inconsistent with or contradicted by any valid, reliable or substantially identical evidence known to respondent unless at the time such representation is made:

(1) respondent relies on an affidavit by a person qualified by training or experience to evaluate such evidence who, relying on standards generally recognized by qualified experts in that particular field, concludes that the inconsistent or contradictory evidence may be disregarded; and

(2) the affidavit states the qualifications of the affiant and sets forth the generally recognized standards on which he relied in reaching his conclusion.

C. Representing, directly or by implication, that the details of any evidence will be forwarded upon request, unless respondent furnishes a fair and accurate summary of all the details of such evidence as to all products to which such representation extends, including the methodology used and any qualifications respecting the applicability of the results.

D. Representing, directly or by implication:

(1) that such product(s), when compared to any or all competing products:

(a) is or will be more dependable or more reliable; or

(b) has required or does or will require less service or less frequent or less costly service,

Unless and only to the extent that respondent has a reasonable basis for such representation which, for the purpose of this subparagraph D(1), shall consist of competent and reliable studies, surveys or scientific or engineering tests. This definition of "reasonable basis" is subject to this exception: for a reasonable period following the introduction of a new feature or a new model of such product, respondent may make representations encompassed by this subpara-

graph D(1) on the basis of literature or generally recognized scientific or engineering principles, but only if respondent immediately undertakes competent and reliable studies, surveys or scientific or engineering tests relating to such representations. If the results of such studies, surveys or tests do not provide a reasonable basis for such representations with respect to the new feature or new model, respondent shall forthwith cease and desist from making such representations;

(2) that such product(s) when compared to any or all competing products has, had or will have any superior service characteristic other than frequency or cost of service, unless and only to the extent that respondent has a reasonable basis for such representation; or

(3) that such product(s) has, had or will have service needs or requirements, unless and only to the extent that respondent has a reasonable basis for such representation.

II

It is ordered, That respondent General Electric Company, a corporation, its successors and assigns, either jointly or individually, and respondent's officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, distribution or sale of any and all monochrome (*i.e.,* black and white) television receivers and color television receivers manufactured or marketed by respondent (any or all of which products are hereafter referred to in this Part II as "such product(s)"), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, with respect to the performance or a performance characteristic of such product(s):

(1) the existence or nature of any fact or product feature;

(2) that such product(s) is superior to any or all competing products in any respect; or

(3) that any representation about such product(s) or any competing product applies to each type or model of such product(s) or such competing product referred to, either directly or by implication,

Unless and only to the extent that respondent has a reasonable basis for such representation; *provided, however,* that this Paragraph A of Part II shall not apply to representations encompassed by subparagraph A(2) of Part I or Paragraph D of Part I.

B. Representing, directly or by implication:

(1) that such product(s) is superior to any or all competing products in

any respect unless such product(s) is superior in each respect in which it is represented to be superior, and respondent either:
(a) identifies the particular aspect of such superiority and discloses the nature or extent of such superiority in terms reasonably understandable to the class of persons to whom the representation is directed (*e.g.*, consumers, dealers or others); or
(b) has a reasonable basis for concluding that, in connection with the possession or use of such product(s), the nature or extent of such superiority will be discernible to or of benefit to the class of persons to whom the representation is directed;

or:

(2) that any representation about such product(s) or any competing product applies to each type or model of such product(s) or competing product when such representation does not apply to each type or model of such product or such competing product referred to, either directly or by implication.

III

If the Federal Trade Commission hereafter promulgates any trade regulation rule or guide governing the advertising or offering for sale of any product governed by this order, which rule or guide is less restrictive than the corresponding provision(s) of this order, and respondent files a motion with the Federal Trade Commission to modify this order to correspond to such less restrictive rule or guide, the Federal Trade Commission shall rule upon respondent's motion within 120 days after such motion is filed or, if respondent's motion to modify is filed at least 60 days prior to the effective date of such rule or guide, then the Federal Trade Commission shall rule upon respondent's motion within 60 days after the effective date of such rule or guide. Should the Federal Trade Commission fail to rule upon respondent's motion to modify within such time periods, then such rule or guide shall automatically be deemed to modify and replace the corresponding provision(s) of this order.

IV

The provisions of Parts I and II of this order will not apply for a period of one year from the date of signature of this order to printed materials other than media advertisements and point of purchase displays.

V

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions engaged in the preparation or placement of advertisements of any product listed in Part I.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That respondent shall, within sixty (60) days after the effective date of this order, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with this order.

IN THE MATTER OF

NATIONAL SERVICE INDUSTRIES, INC., T/A CERTIFIED LEASING COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2876. Complaint, Apr. 7, 1977 — Decision, Apr. 7, 1977

Consent order requiring an Atlanta, Ga., furniture leasing corporation, among other things, to cease failing to maintain adequate records for three years following the expiration date of leases; and follow prescribed procedures to locate and make proper refunds to qualified customers. Additionally, the order requires respondent to furnish lessees with detailed written notices, and prohibits the use of these notices in the collection of delinquent debts.

Appearances

For the Commission: *Michael E.K. Mpras* and *Robert L. Patterson.*

For the respondents: *Jack L. Lahr* and *Christopher Smith, Arent, Fox, Kintner, Plotkin & Kahn,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that National Service Industries, Inc., a corporation, doing business as Certified Leasing Company, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent National Service Industries, Inc., doing business as Certified Leasing Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 1180 Peachtree St., N.E., Atlanta, Georgia.

PAR. 2. Respondent National Service Industries, Inc., through its various subsidiaries and divisions, operates numerous plants, including those engaged in the production or manufacture of furniture, safety and protective products, amusement parks, and is engaged in the leasing or retail selling of furniture, through its unincorporated operating division, Certified Leasing Company, which operates approximately 17 furniture leasing and retail selling stores in seven states.

PAR. 3. Respondent operates and controls retail stores which sell or lease furniture and other merchandise to be shipped and delivered from their warehouses and from the places of business of their various suppliers to their warehouses and retail stores for leasing to and purchase by the general public located in states other than those from which such shipments and deliveries originate. By these and other acts and practices, respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in merchandise and services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the ordinary course and conduct of its aforesaid business, respondent enters into lease agreements with individual customers whereby such customers lease furniture from respondent for a set period of time. Under the terms of the lease agreement, consumer lessees are required to pay to respondent a security deposit which is usually equivalent to the charge of one month's furniture rental. Further, the lease agreement requires consumer lessees to perform other acts or fulfill conditions and covenants, including the return of leased items in the same condition respondent delivered to them, ordinary wear excepted, at the expiration or termination of the lease period. Upon expiration or termination of the lease, respondent determines to what extent a consumer lessee has complied with the conditions of the lease agreement. If all obligations, conditions or covenants have not been met, respondent makes deductions from the consumer lessees' deposited money in amount deemed adequate to cover the expenses or charges incurred because of the consumer lessee's failure to comply with the lease requirements, ordinary wear excepted.

After such deductions, if any, are made from the consumer lessee's security deposit, respondent's records indicate the amount of the consumer lessee's security deposit, if any, which is returnable to the consumer lessee.

PAR. 5. Respondent, seldom, if ever, informs or attempts to inform consumer lessees that there is a portion of the security deposit which is returnable to the consumer lessees. Furthermore, seldom, if ever, does respondent voluntarily return security deposit balances without consumer lessees' specific requests. In those instances where consumer lessees do not specifically request return of their security deposit balance, respondent often, if not always, removes the returnable balances from the consumer lessees' accounts, and transfers said balances into one of its income accounts.

PAR. 6. By failing to attempt to notify consumer lessees that there

is a portion of the security deposit which is returnable to the consumer lessees, by requiring that consumer lessees specifically request the return of the balance of any security deposit balance remaining after legitimate expenses under the lease have been charged against such deposit, and by transferring said returnable balances into one of its income accounts, respondent has caused a substantial number of consumer lessees to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Five above were and are unfair.

PAR. 7. The acts and practices of the respondent as herein alleged, were, and are, all to the prejudice and injury of the public and constituted, and now constitute unfair acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Washington, D. C. Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended; and

The respondent, its attorney and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Proposed respondent National Service Industries, Inc., doing business as Certified Leasing Company, is a corporation organized, existing and doing business under and by virtue of the laws of the

State of Delaware with its office and principal place of business located at 1180 Peachtree St., N.E., Atlanta, Georgia.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent National Service Industries, Inc., a corporation, doing business as Certified Leasing Company, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the leasing to consumers of furniture, related accessories, or any other personal property, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Failing to request, both orally and in writing, at the time the lease agreement is signed with two or more legally unrelated persons, which person will be designated by the joint lessees to be the recipient of the lessees' returnable security deposit in the event that respondent is obligated to return the full security deposit or any portion thereof to such customers.

2. Failing to incorporate on the face of the lease agreement, in bold print, the following notice which shall be given to the lessee at the time the lease agreement is signed.

NOTICE

> You may be entitled to a refund of all or a portion of your security deposit at the termination of this lease agreement. Retain this reminder so that you may send us a forwarding address where you can be reached so that we can promptly forward any balance of the security deposit due you.

3. Failing to request from the lessee, both orally and in writing, at the time the lease agreement is signed, a tentative forwarding address where the security deposit, or any portion thereof which may be returnable to the lessee, can be mailed if no updated forwarding address is received prior to or at the termination of the lease agreement.

4. Failing, when notice of termination of the lease agreement is received telephonically, to request from the lessee at that time a forwarding address.

5. Failing to send written notice by first class mail prior to the expiration of the term of the lease agreement to the lessee's last

known address requesting a forwarding address within five business days after receiving notification of the lessee's intent to terminate the lease agreement, if such forwarding address has not been received.

6. Failing to send by first class mail, with the envelope captioned "PLEASE FORWARD," the security deposit, or any portion thereof which may be returnable to the lessee, including an itemized accounting of respondent's charges against the lessee's security deposit within thirty (30) days from the termination of the lease agreement, to the lessee's updated forwarding address or to the tentative forwarding address obtained at the time the lease agreement was signed if no updated address has been received, or in the absence of the above, to the lessee's last known address; and failing in all other situations to provide within 30 days, by first class mail, such itemized accounting upon the oral or written request of the lessee.

It is further ordered:

A. That respondent attempt to refund all security deposits or portions thereof due lessees whose lease terminated or expired within three months from the effective date of this order. In attempting to refund all returnable deposited money, respondent shall perform the following steps:

1. Determine whether the lessee's file contains an address to which a returnable deposit is to be forwarded. If so, respondent shall forward a check in that amount to the lessee or his designee at the address given.

2. If no forwarding address is given, respondent shall send a notice by first class mail, with the envelope captioned "PLEASE FORWARD," to the lessee's last known address informing such lessee that a refund is due him, and that he should immediately contact the respondent at the address or telephone number given, requesting an address correction.

3. If the letter is returned by the post office as undeliverable, respondent shall:

(a) Determine from information set forth in the lessee's credit application filed by the lessee incident to the consummation of the lease agreement the name and address of the lessee's parents, employer and a listed personal reference of the lessee.

(b) Forward the notice in the form set forth below, entitled "We need your help," to either the parents, employer, or one listed personal reference of the lessee, if such names and addresses are available in the lessee's file.

WE NEED YOUR HELP

The individual listed below recently rented furniture from Certified Leasing Company and placed a security deposit with us. The individual is entitled to a refund of all or a portion of such deposit, which refund will be sent as soon as we can determine a current address.

If you know the individual's current address and/or telephone number, please complete the following form and return it to us. The postage is prepaid.

Thank you for your help.

CERTIFIED LEASING COMPANY

_____
Lessee

_____ _____
Street Apt.

_____ _____ _____
City State Zip Code

( )

Area Code Telephone Number

B. That respondent shall not use the notices described in paragraphs 2. and A. 3.(b) of the order to collect or attempt to collect delinquent accounts.

C. That respondent maintain, for a period of three years from the date the lease was terminated or expired, adequate records including a complete summary of each lessee's file which (1) substantiate that respondent is following the procedures specified in the order, and (2) readily disclose the disposition of the lessee's security deposit and the reasons therefor, including a notation of the specific amount of money due the lessee from his security deposit; any request by such person within three years from the date the lease was terminated or expired for the return of the deposit due shall be honored by mailing the balance of said deposit within thirty (30) days from the date of receipt of such request.

D. That respondent deliver a copy of this order to all present and future administrative and sales employees engaged in any aspect of communicating with customers with respect to the leasing to

consumers of furniture or other personal property, and that respondent secure a signed statement acknowledging receipt of said order from each such person.

E. That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent or its division such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation or its division which may affect compliance obligations arising out of the order.

F. That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

SEARS, ROEBUCK AND CO.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8993. Complaint, Sept. 17, 1974 --- Decision, Apr. 11, 1977

Consent order requiring a Chicago, Ill., merchandising organization, among other things, to cease using bait and switch tactics and other unfair or deceptive strategies in the advertising and sale of major home appliances. The order further requires the firm to conspicuously post copies of advertisements in the proper departments of stores, and to have sufficient quantities of the advertised items available to meet reasonably anticipated demand.

Appearances

For the Commission: *James S. Teborek, James F. Drzewiecki, Robert C. Goldberg, Blanche Stein,* and *Thomas D. Massie.*

For the respondent: *Richard P. Robinson,* Chicago, Ill., *Lloyd S. McClelland,* Chicago, Ill., *Burton Y. Witzenfeld, Arnstein, Bluck, Witzenfeld & Minow,* Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Sears, Roebuck and Co., a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sears, Roebuck and Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 925 South Homan Ave., Chicago, Illinois.

PAR. 2. Respondent is the largest merchandising organization in the United States. Respondent is now, and has been for some time last past, engaged in the advertising, offering for sale, sale and distribution of a wide variety of consumer products, including sewing machines, washers and dryers, and other major home appliances throughout the United States. The term "major home appliance" is defined herein as any home appliance in which there are two or more models in the product line and the most expensive model has a retail price in excess of ($50.00) fifty dollars. Said respondent conducts said business by mail and telephone sales from catalogs and through its

retail department stores located in each State of the United States. Sales by respondent's retail department stores are its most important source of sales. This complaint concerns respondent's sales of products through its retail department stores.

PAR. 3. In the course and conduct of its business as aforesaid, respondent ships, and causes to be shipped, sewing machines, washers and dryers, and other major home appliances to said retail department stores for sale to the purchasing public. Advertising and promotional material is prepared or caused to be prepared by respondent in Chicago, Illinois, and transmitted to respondent's retail department stores for their use. In the course and conduct of its business as aforesaid, respondent now causes and for some time last past has caused, the publication of said advertising, concerning sewing machines, washers and dryers, and other major home appliances in newspapers of general circulation. Respondent further engages in business, in commerce, consisting of the transmission and receipt of letters, invoices, reports, contracts and other documents of a commercial nature between respondent's headquarters and its retail department stores in the various states, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Typical and illustrative, but not all inclusive, of the major home appliances advertised and the statements made in such advertisements are the following:

Sewing Machine Sale

ZIG ZAG

Portable * * *

Sews zig zag or straight stitches to make fashion clothing or to do everyday mending * * * Sews buttonholes, sews on buttons, monograms.

Your Choice

$58

Cabinet Model

Sews straight stitches forward and reverse, even over seams! * * *

* * * * * * *

Portable Zig Zag Sewing Machine From Sears * * * $58

Sews on buttons, sews buttonholes; Does zig-zag or straight stitching

Mongrams, appliques, other fancy work For household linens, gifts

Sews forward and reverse for her convenience

PAR. 5. Through the use of the aforesaid statements and others not specifically set out herein, respondent has represented, directly and by implication, that the offers set forth in said advertisements are bona fide offers to sell the advertised sewing machines, washers and dryers, and other major home appliances at the prices mentioned in said advertisements.

PAR. 6. In truth and in fact, said offers were not, and are not bona fide offers to sell respondent's sewing machines, washers and dryers, and other major home appliances at the advertised prices, but, to the contrary were, and are, made to induce prospective purchasers to visit respondent's retail department stores.

Therefore, the statements and representations as set forth in Paragraphs Four and Five were, and are, false, misleading and deceptive.

PAR. 7. When prospective purchasers visit respondent's retail department stores in response to respondent's aforesaid advertisements and attempt to purchase the advertised sewing machines, washers and dryers, and other major home appliances at the advertised prices, respondent's salesmen make no effort to sell the advertised major home appliances, but, in fact, disparage the advertised sewing machines, washers and dryers, and other major home appliances in a manner calculated to discourage the purchase thereof, and attempt to, and often do, sell other sewing machines, washers and dryers, and other major home appliances to said prospective purchasers at higher prices. By way of disparaging said major home appliances, respondent's salesmen point out certain features that the advertised major home appliances are lacking without disclosing the absence of these features in respondent's aforesaid advertising. Among and typical, but not all inclusive of the disparaging statements and representations made by respondent's salesmen are the following:

1. The advertised sewing machines are noisy and not quiet running;

2. Certain of the aforesaid sewing machines will not sew straight stitch, zig zag stitch, or in reverse;

3. The advertised sewing machines do not have respondent's standard sewing machine guarantee and are not guaranteed for as long a period of time as respondent's more expensive sewing machine models;

4. Prospective purchasers will find it difficult to adjust the

advertised sewing machines to sew over seams in material on different thicknesses of material;

5. The advertised sewing machine will not sew buttonholes;

6. None of the advertised sewing machines are available for sale; and if the advertised machines are ordered, there will be long delays in delivery.

PAR. 8. In truth and in fact, the aforesaid disparaging statements and representations made by respondent's salesmen have the effect of discouraging prospective purchasers from purchasing the advertised sewing machines, washers and dryers, and other major home appliances and inducing said prospective purchasers to purchase other sewing machines, washers and dryers, and other major home appliances at higher prices.

PAR. 9. Respondent has advertised certain of its lower priced models of sewing machines, washers and dryers, and other major home appliances with the intention that respondent's salesmen will be able to make misleading comparisons between the lower priced models and higher priced models of said appliances.

PAR. 10. Respondent uses a method of compensating its salesmen of sewing machines, washers and dryers, and other major home appliances that rewards said salesmen for selling higher priced sewing machines, washers and dryers, and other major home appliances. At the same time respondent deters said salesmen from selling the advertised sewing machines, washers and dryers, and other major home appliances. This combination of circumstances has forced or encouraged respondent's salesmen of sewing machines, washers and dryers, and other major home appliances to use bait and switch sales tactics such as those described in Paragraphs Seven, Eight and Nine.

PAR. 11. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in commerce, with corporations, firms and individuals, engaged in the sale and distribution of sewing machines, washers and dryers, and other major home appliances of the same general kind and nature as those sold by respondent.

PAR. 12. The use by respondent of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and to induce a substantial number thereof to purchase respondent's said sewing machines, washers and dryers, and other major home appliances at higher prices than said members of the

purchasing public had intended to pay by reasons of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Commissioner Thompson dissenting.

DISSENTING STATEMENT OF COMMISSIONER THOMPSON

Commissioner Thompson believes that, since no effort has been made in this matter to address the question of whether the products the customer is being "switched" *to* are themselves good buys or bad ones in relation to comparable items offered by competing outlets, there has been no showing of probable consumer injury here. In the absence of such a showing, he cannot find, as Section 5(b) of the FTC Act requires, that the "proceeding" instituted by the filing of this complaint "would be to the interest of the public * * *" 15 U.S.C. 45(b). Given a limited budget, an expenditure of resources to stop what the staff apparently concedes is a "victimless crime" necessarily means a comparable reduction in the number of cases this agency can bring that, unlike this one, involve real economic injury to the consuming public.

SEPARATE STATEMENT OF CHAIRMAN ENGMAN

Concurred in by Commissioner Hanford

In contrast to Commissioner Thompson's characterization of the violation alleged in this case, I do not believe, nor do I think the staff concedes, that a blatant bait-and-switch advertising scheme constitutes a "victimless crime." I would consider this to be true even if there were a showing that the products which customers are switched *to* are comparable in price and quality to those offered by competing sellers.

Numerous prior Commission orders and the Commission's *Bait Advertising Guide* make it clear that Section 5 of the Federal Trade Commission Act is violated when a retailer advertises a low priced product to entice customers into his place of business and then, according to a preconceived selling plan, disparages the low priced item in an attempt to push a higher priced product on the customer. Such selling tactics are often accompanied by unreasonably low inventories of advertised items, high pressure sales methods once the customer is in the store, misrepresentations about the real value of

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the advertised items, and, as alleged in this instance, employee discipline and compensation systems which discriminate unfairly against the sale of low priced, advertised merchandise.

The customer is victimized in bait-and-switch schemes because he or she makes the initial choice to patronize the advertiser's store rather than his competitors on the assumption that advertisements of low priced items have been made in good faith. In actuality, of course, the bait-and-switch advertiser has used the advertising as a deceptive gimmick to get the customer in his store first and thus to gain unfair advantage over his competitors. If the allegations of large scale bait-and-switch advertising in this complaint are proved through the adjudicative process, I would consider entry of an appropriate order very much in the public interest.

Decision and Order

The Commission having heretofore issued its complaint charging the respondent with violation of Section 5 of the Federal Trade Commission Act, and the respondent having been served with a copy of the complaint; and

Respondent Sears, Roebuck and Co. and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having withdrawn the matter from adjudication for the purpose of considering the agreement containing consent order; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25(d) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Sears, Roebuck and Co. is a New York corporation with its office and principal place of business located at Sears Tower, Chicago, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

For purposes of this consent order, the following definition shall apply:

A. The term "major home appliance" includes (but is not limited to) home appliances within the following product lines sold by respondents: automatic laundry (washers and dryers); sewing machines; vacuum cleaners and sweepers; refrigeration products (refrigerators and chest or upright freezers); stoves, ranges and ovens; room air conditioners; humidifiers and dehumidifiers; televisions; dishwashers; floor polishers; and home audio electronic equipment.

II

It is ordered, That respondent Sears, Roebuck and Co., a corporation, its successors and assigns, and respondent's employees, agents, representatives, including sales representatives, directly or through any corporation subsidiary, division, or other device, in connection with the advertising, offering for sale, sale and distribution of sewing machines, washers and dryers and other major home appliances, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making representations directly or indirectly, orally or in writing, that any major home appliances are offered for sale when such representation is not a bona fide offer to sell such major home appliances.

2. Offering for sale any major home appliance when such offer is not a bona fide offer to sell such major home appliance.

3. Disparaging, in any manner, any major home appliance which is advertised or offered for sale.

4. Utilizing demonstrations or displays of any advertised major home appliance in which said appliance is made to appear defective for the purpose of discouraging its purchase.

5. Making, directly or by implication, orally or in writing, any false, misleading or deceptive comparisons between the advertised major home appliances and other home appliances of the same product line.

6. Failing to have available at each store to which the advertise-

ment applies, or at a warehouse facility serving each such store, quantities of advertised major home appliances sufficient to meet reasonably anticipated demands for such appliances, or failing to take orders for such reasonably anticipated demands from customers desiring to purchase advertised major home appliances or failing to deliver such ordered merchandise within a reasonable period of time after purchase by customers.

It is further ordered, That respondent maintain and produce for inspection and copying by a representative of the Federal Trade Commission for a period of three years following the date of publication of any local advertisement of sewing machines, washers and dryers and other major home appliances adequate records to document for the entire period during which each advertisement was run:

a. the total volume of sales in units of advertised major home appliances at the advertised price by each store to which the advertisement applies;

b. monthly inventory statements for each store to which the advertisement applies of the units of major home appliances featured in each advertisement;

c. the total volume of sales in units of major home appliances by stock or model number within the advertised product line by each store to which the advertisement applies.

The recordkeeping provision of this order shall be limited to major home appliances which have two or more models in the product line with a retail cost of $100 or more, *provided, however,* no records need be created or maintained for any major home appliances sold at a retail price of $35 or less each.

It is further ordered, That respondent shall forthwith cease and desist from disseminating, or causing the dissemination of any printed advertisement which represents that major home appliances are available for sale at a stated price at any of its stores, unless respondent clearly and conspicuously sets forth in each such advertisement:

Each of these advertised items is readily available for sale as advertised.

It is further ordered, That respondent shall post a copy of such advertisement, including a copy of the notice referred to in the previous paragraph, at a conspicuous place in the major home appliance department or departments of each store to which such advertisement applies, throughout the period to which the advertisement applies.

It is further ordered, if the respondent advertises by radio and television and does not advertise in print advertisements during any given period, that major home appliances are available for sale at a stated price at any of its stores, respondent shall post at a conspicuous place in the major home appliance department or departments of each store to which such advertisement applies, throughout the period to which the advertisement applies, a sign not less that 11" by 14", which shall include the full text of said advertisement, together with the legend:

> Each of these advertised items is readily available for sale as advertised.

It is further ordered, That respondent after showing a customer, responding to an advertisement, the advertised model in a reasonable manner and making a bona fide offer to take an order for such advertised major home appliance, may offer to, and if the customer so desires, may show the customer other models of major home appliances within the same product line. This paragraph shall not be construed or interpreted to limit or modify any other paragraph of this order.

It is further ordered, That respondent shall deliver a copy of this order to all present and future managerial personnel and salespersons engaged in the sale of major home appliances or in any aspect of the preparation, creation, or placing of advertisements of such products and secure from each such person a signed statement acknowledging receipt of said order.

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent shall within sixty (60) days after the service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

CENTURY 21 COMMODORE PLAZA, INC., ET AL.

Docket 9088. Interlocutory Order, Apr. 20, 1977

Denial of complaint counsel's motion to amend complaint by adding a new theory; and remand of remainder of motion to ALJ as being within his authority on which to act.

ORDER

Complaint counsel move to amend paragraphs 14a and 15a of the complaint. These paragraphs now provide in part as follows:

14. In print advertising and elsewhere, respondents, directly or by implication, make and have made numerous representations to prospective purchasers with respect to the facilities and services associated with the purchase of respondents' condominium units, including but not limited to representations that:

a. The water of Morgan Bay was safe and healthy for swimming at the time such representations were made.

15. In truth and in fact:

a. Respondents knew or had reason to know that Morgan Bay was not safe and healthy for swimming.

Complaint counsel request that the following language be substituted:

14. * * *

a.(1) Morgan Bay was, is, and will be safe, healthy, and suitable for swimming and bathing.

(2) At the time of the first dissemination of the representations challenged herein and thereafter, the respondents had and relied upon a reasonable basis for the claim that Morgan Bay was, is, and will be safe, healthy, and suitable for swimming and bathing.

15. * * *

a. (1) Morgan Bay was not, is not, and will not be safe, healthy, and suitable for swimming and bathing.

(2) At the time of the first dissemination of representations challenged herein and thereafter, Respondents did not have and did not rely upon a reasonable basis for the claim that Morgan Bay was, is, and will be safe, healthy, and suitable for swimming and bathing.

According to complaint counsel, the proposed amendments would simply make it clear that the complaint, as it originally issued, alleged that (1) respondents had represented to consumers not only that the water of Morgan Bay was "safe and healthy" for swimming as of the time the representations were made, but also that the bay

would continue to be suitable for swimming; and (2) respondents' representations were unfair and deceptive because respondents lacked a "reasonable basis" for this claim. The administrative law judge concluded that he lacked authority to grant the motion and certified it to the Commission with "the strongest possible recommendation that it be denied."

The law judges have authority to allow an appropriate amendment to pleadings "only if the amendment is reasonably within the scope of the original complaint * * *. Motions for other amendments * * * shall be certified to the Commission." Rules of Practice, Section 3.15(a). The ALJ lacks authority to permit modifications where the effect is an alteration of the underlying theory behind the complaint. He may, however, permit service of an amended pleading that merely clarifies allegations of the complaint or adds examples or practices already alleged to be unlawful. *See, e.g., Cavanagh Communities Corp.*, 87 F.T.C. 143, 144 n. 2, 3 (1976).

We agree with the ALJ that the theory underlying the "lack of reasonable basis" allegation is sufficiently different from the charge already alleged to require certification of this portion of the motion. We also agree that insufficient justification has been offered for adding a new theory at this time.[1] The request is, therefore, denied.

We disagree, however, with the ALJ's decision to certify the portion of complaint counsel's motion to amend the complaint to make it clear that evidence of the recent suitability of Morgan Bay for swimming may be introduced. This proposed amendment is reasonably within the scope of the complaint, *see Cavanagh, supra,* and is, therefore, within the ALJ's authority to order. This portion of the motion is remanded to the ALJ.[2]

It is so ordered.

[1] According to the ALJ, addition of the new theory might delay the presentation of respondents' case for several months.

[2] The ALJ, of course, indicates in his certification order that he would be inclined to deny this amendment.

IN THE MATTER OF

SEARS, ROEBUCK AND CO.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2885. Complaint, Apr. 20, 1977 — Decision, Apr. 20, 1977

This consent order, among other things, requires a Chicago, Ill., department store chain, in its capacity of shopping center developer and/or major tenant, to cease entering into and enforcing agreements which exclude particular classes of occupants; control tenants' advertising, goods and prices; or otherwise restrict competitive trade. Additionally, to ensure compliance with the terms of the order, respondent is prohibited from using the same officers and employees in its separate capacities as tenant or shopping center developer.

Appearances

For the Commission: *James D. Tangires, Jerry W. Boykin, Eugene R. Webb,* and *Michael Dershowitz.*

For the respondent: *Lloyd S. McClelland,* Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. 41, *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the corporation named as respondent in the caption hereof, and more particularly designated and described hereinafter, has violated and is now violating, the provisions of Section 5 of the Federal Trade Commission Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint, stating the following:

PARAGRAPH 1. For the purpose of this complaint the following definitions shall apply:

(a) The term "respondent" refers to Sears, Roebuck and Co., its operating divisions, its subsidiaries including but not limited to Homart Development Co., and their respective officers, agents, representatives, or employees.

(b) The term "shopping center" refers to a group of retail outlets in the United States of America planned, developed and managed as a unit and containing (1) a total floor area designed for retail occupancy of 200,000 square feet or more, of which at least 50,000 square feet are for occupancy by tenants other than respondent, (2) at least two tenants other than respondent, (3) at least one major tenant other than respondent, and (4) on-site parking.

(c) The term "tenant" refers to any retail occupant or potential occupant of floor area in a shopping center, whether as a lessee or owner of such space, but the term does not refer to an occupant of space within the store or other area occupied by respondent which occupant operates as a department for respondent pursuant to a license from respondent.

(d) The term "major tenant" refers to a tenant providing primary drawing power in a shopping center. A tenant which occupies at least 50,000 square feet of floor area will be deemed to provide primary drawing power.

(e) The term "retailer" refers to a tenant which sells merchandise or services to the consuming public.

(f) The terms "range of prices," "range of fashions" and "range of quality" refer to such descriptive words as, but not limited to, "popular priced," "medium priced," and "high priced;" "low or popular fashion," "medium fashion," and "high fashion;" "low or popular quality," "medium quality" and "high quality," which identify a tenant as a member of a class of merchants which sell their merchandise within a generally identifiable range of prices.

(g) The term "radius restriction" refers to a limitation which precludes a tenant, directly or indirectly, from engaging in, owning, or operating any business within a specified radius or distance from a shopping center.

(h) The term "developer" means any business entity which plans, constructs, or operates a shopping center and negotiates and executes lease agreements with tenants.

(i) The term "shopping center joint venturer" or "joint venturer" means any shopping center developer who enters into an agreement with Sears, Roebuck and Co. through its subsidiary Homart Development Co. to develop, construct, or operate a shopping center.

(j) The term "Agreement" refers to any Operating Agreement, Reciprocal Easement Agreement (R.E.A.), lease, or other contract of any kind, oral or written, which sets forth a relationship between the parties relating to the occupancy of floor area in a shopping center.

PAR. 2.:

A. Respondent Sears, Roebuck and Co., (hereinafter sometimes referred to as Sears), is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at Sears Tower, Chicago, Illinois. Sears is the largest department store chain in the Nation with stores in all fifty states and the District of Columbia. Its net sales have grown from $4,578,000,000 in 1962 to $12,306,000,000 in 1973. Approximately 900 retail stores generate 78 percent of its

business volume. Sears is also a major tenant in over 265 shopping centers throughout the Nation.

B. Homart Development Co., (hereinafter sometimes referred to as Homart), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located also at Sears Tower, Chicago, Illinois. Sears dominates and controls the acts and practices of its wholly-owned, unconsolidated subsidiary, Homart Development Co. Homart has developed and built more than sixteen shopping centers. It sold one in 1972, one in 1973, and now operates nine by itself, one through local Sears retail store management, and five others with shopping center joint venturers. It has several other shopping centers under construction. Sears is a major tenant in all shopping centers in which Homart is a developer. Homart had rents, sales and other revenues from its solely-owned shopping centers of $15,438,000, as of January 31, 1972; $18,543,000, as of January 31, 1973; $21,986,000, as of January 31, 1974. Homart had rents, sales and other revenues from its joint venture shopping centers of $6,174,000, as of December 31, 1971; $20,807,000, as of December 31, 1972; $19,788,000, as of December 31, 1973.

PAR. 3. In the course and conduct of its business, respondent Sears has engaged, and is now engaged in acts and practices in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended. Respondent purchases for resale a great variety of consumer products from a large number of suppliers located throughout the United States. Respondent causes these products to be transported from the place of manufacture or purchase to its business establishments located in all fifty (50) states and the District of Columbia. Such products have been and are advertised and offered for sale by respondent in newspapers circulated among and between the several States of the Nation. In its capacity as shopping center developer, respondent, through its Homart subsidiary, uses the United States mail extensively. Respondent has, and is, engaged in interstate land purchases, lease negotiations and transactions with shopping center joint venturers and tenants. Respondent, in its capacity as shopping center developer, through its subsidiary Homart, has disseminated and is disseminating advertisements and promotional materials concerning shopping centers and the tenants therein, by various communications media in commerce, for the purpose of soliciting tenants in and among the various states. Respondent's shopping centers advertise in newspapers of interstate circulation. Thus respondent's volume of business is substantial, and its acts and practices, as hereinafter set forth, are in or affecting

commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. Except to the extent that competition has been hindered, frustrated and eliminated as set forth in this complaint, respondent, in the course and conduct or its business of offering for sale, and selling, household goods, home furnishings, apparel and services and of developing and operating shopping centers, through its subsidiary Homart, has been, and is in substantial competition with other corporations, individuals and partnerships in the retail sale of the same or comparable types of merchandise and services carried and sold by respondent and also in the ownership, development and operation of shopping centers.

PAR. 5. Respondent Sears, in its capacity as a major tenant or through its subsidiary Homart, has entered into negotiations with various prospective major tenants, shopping center joint venturers, and developers for the purpose of either developing and operating shopping centers, or for the purpose of establishing a retail store in either a Homart or non-Homart shopping center. During the course of such negotiations, the parties thereto have contracted, combined and conspired to include certain provisions in Agreements. These resultant provisions, more fully described hereinafter, authorized Sears, major tenants, shopping center joint venturers, or developers to control and determine the admission of tenants into shopping centers and control conditions affecting tenants. These provisions suppress, restrict, hinder, lessen, prevent and foreclose competition in the retail distribution of goods and services.

PAR. 6. In the course and conduct of its business respondent Sears, in its capacity as a major tenant, is, and has been, engaged in unfair methods of competition in or affecting commerce, in that it has entered into Agreements with major tenants, shopping center joint venturers, and developers to exclude from shopping centers, certain tenants and categories of tenants, such as discount stores, variety stores, junior department stores and other department stores. Further, it has entered into Agreements or has included provisions therein which confer on respondent, in its capacity as a major tenant, certain rights or afford respondent certain means by which it achieves the exclusion of other tenants. The latter Agreements enable respondent to:

(a) approve or disapprove the entry of tenants or categories of tenants; and

(b) establish and circulate lists of approved tenants and categories of tenants, from which future tenants will be chosen.

Respondent has used the rights or means provided by these Agreements to exclude other tenants.

PAR. 7. The aforesaid Agreements and the actions of respondent pursuant thereto, have had and continue to have the tendency to restrain trade and commerce in shopping centers. Included among the effects of such restraints are the following:

(a) boycotting potential tenants from shopping centers;

(b) allowing respondent to choose its competitors and to exclude actual and potential competitors; and

(c) restricting, hindering and coercing joint venturers or developers in their choice of tenants.

PAR. 8. In the course and conduct of its business, respondent Sears, in its capacity as a major tenant, is, and has been, engaged in unfair methods of competition in or affecting commerce, in that it has entered into Agreements with major tenants, shopping center joint venturers, and developers to maintain, control, fix and establish the range of prices, the range of fashions, the range of quality and the retail selling prices of goods and services offered for sale by tenants in shopping centers. Acting pursuant to these Agreements, shopping center joint venturers, developers or respondent includes certain price, fashion, or quality requirements in leases entered into with other tenants. Such Agreements have had, and continue to have, the tendency to restrain trade and commerce in shopping centers in that they eliminate, hinder, and discourage discount selling; fix, control, and maintain retail prices; and deny the public the benefit of price competition.

PAR. 9. In the course and conduct of its business, respondent Sears, in its capacity as a major tenant, is, and has been, engaged in unfair methods of competition in or affecting commerce, in that it has entered into Agreements with major tenants, shopping center joint venturers or developers, which Agreements enable respondent Sears to do the following or which themselves:

(a) limit the amount of floor space available to tenants or for specific use by various tenants;

(b) limit the types of products or services to be sold by tenants;

(c) control, restrict, or prohibit other tenants in the conduct of sales, use of advertising, or other methods of promotion;

(d) determine or approve the location of various tenants in shopping centers;

(e) require other tenants to continue operating their stores in shopping centers in a manner similar to that which the tenants operate at other locations so as to determine or control the price ranges, fashion or quality ranges, or particular brands or types of

goods and services which other tenants may sell in shopping centers; or

(f) determine or approve the minimum hours of operation of other tenants in shopping centers.

These Agreements are implemented by respondent through its subsidiary Homart or through shopping center joint venturers or developers.

PAR. 10. Such Agreements, as identified in Paragraph Nine, have had and continue to have the tendency to restrain trade and commerce in shopping centers in that they:

(a) limit the extent to which tenants can compete within shopping centers;

(b) limit a tenant's right to determine the types of products and services to be sold;

(c) eliminate, hinder, and discourage discount advertising, discount pricing, and discount selling;

(d) allow respondent to control the location of tenants in shopping centers so as to induce the public to shop in areas where respondent's stores are located;

(e) restrict other tenants to specified methods of operation so as to limit the price ranges, fashion or quality ranges, or brands of goods and services tenants may sell to the consuming public in shopping centers;

(f) deny other tenants the right to choose the minimum hours of business during which they may compete; and

(g) deny the public the benefit of price competition.

PAR. 11. In the course and conduct of its business, respondent Sears, in its capacity as a major tenant, is, and has been, engaged in unfair methods of competition in or affecting commerce, in that it has entered into Agreements with major tenants, shopping center joint venturers or developers to impose "radius restrictions" upon tenants in shopping centers in order to preclude them from placing other stores similar to their own within a specified distance from said shopping centers. Such Agreements are implemented by respondent through its subsidiary Homart or by shopping center joint venturers or developers. Such Agreements tend to restrain trade and commerce in that they limit the number and location of retail stores operated by tenants outside of the shopping center, thereby limiting competition and limiting the number and location of other retail stores that might otherwise be accessible to the public.

PAR. 12. In the course and conduct of its business, respondent Sears, in its capacity as a shopping center developer, is, and has been, engaged in unfair methods of competition in or affecting commerce,

in that it has entered into Agreements with major tenants and shopping center joint venturers to maintain, control, fix and establish the range of prices, the range of fashions, the range of quality and the retail selling prices of goods and services offered for sale by tenants in shopping centers. Acting pursuant to these Agreements, shopping center joint venturers or respondent, includes certain price, fashion or quality requirements in the leases entered into with tenants. Such Agreements have had, and continue to have, the tendency to restrain trade and commerce in shopping centers in that they eliminate, hinder, and discourage discount selling; fix, control, and maintain retail prices; and deny the public the benefit of price competition.

PAR. 13. In the course and conduct of its business, respondent Sears, in its capacity as a shopping center developer, is, and has been, engaged in unfair methods of competition in or affecting commerce, in that it has entered into and implemented Agreements which impose "radius restrictions" upon tenants in Homart shopping centers. Such Agreements tend to restrain trade and commerce in that they limit the number and location of retail stores operated by tenants outside of Homart shopping centers, thereby limiting competition among shopping centers, and limiting the number and location of other retail stores that might otherwise be accessible to the public.

PAR. 14. In the course and conduct of its business, respondent Sears, in its capacity as a shopping center developer, is, and has been, engaged in unfair methods of competition and unfair acts and practices in or affecting commerce by conditioning approval of certain tenants for entry into its shopping centers upon such tenants' agreement to occupy space in another Homart shopping center. That condition of approval for entry has had, and continues to have, the tendency to restrain trade and commerce among shopping centers. Included among the effects of such restraints are the following:

(a) denying tenants the freedom to occupy space in the shopping centers of their choice; and

(b) denying developers, competing with respondent, the freedom to negotiate with such tenants for the occupancy of space in the developers' shopping centers.

PAR. 15. The aforesaid acts, practices, and methods of competition of the respondent, as herein alleged, and the adverse competitive effects resulting therefrom, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted, and now constitute, unfair acts and practices and unfair methods of

competition in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Washington, D.C. Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Sears, Roebuck and Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at Sears Towers, Chicago, Illinois. 60684

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and the respondent, and the proceeding is in the public interest.

ORDER

I

For the purpose of this order the following definitions shall apply:

(a) The term "respondent" refers to Sears, Roebuck and Co., its operating divisions, its subsidiaries including but not limited to

Homart Development Co., and their respective officers, agents, representatives, or employees.

(b) The term "shopping center" refers to a group of retail outlets in the United States of America planned, developed and managed as a unit and containing (1) a total floor area designed for retail occupancy of 200,000 square feet or more, of which at least 50,000 square feet are for occupancy by tenants other than respondent, (2) at least two tenants other than respondent, (3) at least one major tenant other than respondent, and (4) on-site parking.

(c) The term "tenant" refers to any retail occupant or potential occupant of floor area in a shopping center, whether as a lessee or owner of such space, but the term does not refer to an occupant of space within the store or other area occupied by respondent, which occupant operates as a department for respondent pursuant to a license from respondent.

(d) The term "major tenant" refers to a tenant providing primary drawing power in a shopping center. A tenant which occupies at least 50,000 square feet of floor area will be deemed to provide primary drawing power.

(e) The term "retailer" refers to a tenant which sells merchandise or services to the consuming public.

(f) The terms "range of prices," "range of fashions" and "range of quality" refer to such descriptive words as, but not limited to, "popular priced," "medium priced," and "high priced;" "low or popular fashion," "medium fashion," and "high fashion;" "low or popular quality," "medium quality" and "high quality," which identify a tenant as a member of a class of merchants which sell their merchandise within a generally identifiable range of prices.

(g) The term "radius restriction" refers to a limitation which precludes a tenant, directly or indirectly, from engaging in, owning, or operating any business within a specified radius or distance from a shopping center.

(h) The term "developer" means any business entity which plans, constructs, or operates a shopping center and negotiates and executes lease agreements with tenants.

(i) The term "shopping center joint venturer" or "joint venturer" means any shopping center developer who enters into an agreement with Sears, Roebuck and Co. through its subsidiary Homart Development Co. to develop, construct, or operate a shopping center.

(j) The term "Agreement" refers to any Operating Agreement, Reciprocal Easement Agreement (R.E.A.), lease, or other contract of any kind, oral or written, which sets forth a relationship between the parties relating to the occupancy of floor area in a shopping center.

II

A. *It is ordered,* That respondent Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in its capacity as a tenant in a shopping center, cease and desist from making, carrying out or enforcing, directly or indirectly, an Agreement or provision of an Agreement, which:

1. prohibits the admission into a shopping center of any particular tenant or class of tenants, including, for purposes of illustration:
(a) other department stores,
(b) junior department stores,
(c) discount stores, or
(d) variety stores;

2. grants respondent the right to approve or disapprove the entry into a shopping center of any other tenant;

3. provides for the formulation or circulation of lists of approved tenants;

4. grants respondent the right to approve or disapprove the amount of floor space that any other tenant may occupy or use in a shopping center;

5. specifies that any tenant in a shopping center shall or shall not sell its merchandise or services at any particular price, or within any range of prices, or within any range of fashions, or within any range of quality, when such descriptions identify tenants as members of a class of merchants which sell their merchandise within a generally identifiable range of prices;

6. limits discount advertising, discount pricing, or discount selling;

7. grants respondent the right to approve or disapprove the amount of floor space that any other tenant may choose to allocate for specific use in a shopping center;

8. limits the types of merchandise or services which any named tenant other than respondent in a shopping center may offer for sale;

9. limits other tenants in a shopping center from conducting bona fide sales;

10. prescribes the minimum hours of business operation of other tenants in a shopping center;

11. grants respondent the right to approve or disapprove the location in a shopping center of any other tenant;

12. provides for radius restrictions upon any tenant in a shopping center; or

13. authorizes a major tenant to limit the types of merchandise or services which respondent may offer for sale in a shopping center.

B. *It is further ordered,* That respondent, in its capacity as a tenant in a shopping center, shall not enter into or carry out any conspiracy, combination, or arrangement with any other tenant or developer to exclude any tenant from a shopping center or to achieve the results which respondent is prohibited from undertaking by Paragraph IIA of this order.

III

A. *It is further ordered,* That respondent, in its capacity as a shopping center developer, cease and desist from making, carrying out, or enforcing, directly or indirectly, an Agreement or provision of an Agreement, which:

1. specifies that any tenant in any shopping center shall or shall not sell merchandise or services at any price, or within any range of prices, or within any range of fashions, or within any range of quality, when such descriptions identify tenants as members of a class of merchants which sell their merchandise within a generally identifiable range of prices;

2. specifies that any tenant in any shopping center shall not be a discounter or sell merchandise or services at discount prices;

3. specifies that any tenant in any shopping center shall be subject to a radius restriction; or

4. specifically conditions the approval of tenant entry into one of its shopping centers upon the tenant's agreement to occupy space in another of its shopping centers.

B. *It is further ordered,* That respondent, in its capacity as a shopping center developer, cease and desist from entering into any Agreement or provision of an Agreement with any tenant that said tenant may:

1. specify or control or may require respondent to specify or control prices, price ranges, fashion ranges, quality ranges, which identify tenants as members of a class of merchants which sell their merchandise within a generally identifiable range of prices; or

2. control or may require respondent to control discounting by any other retailer; or

3. exclude any retailer from any of respondent's shopping centers by reason of such retailer's discount selling or discount advertising.

C. *It is further ordered,* That respondent cease and desist from using the same officers or other employees in respondent's separate capacities as a tenant in or as a developer of shopping centers.

D. *It is further ordered,* That this order shall not prohibit

respondent, in its capacity as a tenant in a shopping center, from including a provision in an Agreement which identifies in designated buildings respondent and those other major tenants which enter into such an Agreement.

E. *It is further ordered,* That this order shall not prohibit respondent, in its capacity as a tenant in a shopping center, from negotiating to include, including, carrying out or enforcing an Agreement or provision in any Agreement which:

1. requires that in regard to the selection of other tenants in the shopping center by the joint venturer or developer the following objective shall be considered --- maintaining a balanced and diversified grouping of financially sound retail stores, merchandise and services;

2. prohibits occupancy of space in a shopping center by clearly objectionable types of tenants, including, for purposes of illustration, establishments selling or exhibiting pornographic materials, massage parlors, and body and fender shops;

3. permits respondent to establish reasonable categories of retailers from which the developer or the landlord may select tenants to be located in the area immediately proximate to respondent's store; *provided,* that such categories shall not include specification of (a) price reasonably accessible to respondent's store determined by the application of such parking ratio to the number of square feet of floor area of respondent's store, (iii) the entrances and exits to and from respondent's store and any malls, and (iv) those parking area mall entrances and exits which substantially serve respondent's store; or

(d) shall be accomplished only after any and all covenants, obligations and standards (for example, construction, architecture, operation, maintenance, repair, alteration, restoration, parking ratio, and easements) of the shopping center, exclusive of the expansion area (i) shall be made applicable to the expansion area and (ii) shall be made prior in right to any and all mortgages, deeds of trust, liens, encumbrances, and restrictions applicable to the expansion area, and (iii) shall be made prior in right to any and all other covenants, obligations and standards applicable to the expansion area.

F. *It is further ordered,* That respondent, in its capacity as a shopping center developer, will within thirty (30) days after service of this order mail a copy of this order and a copy of Letter "A", attached hereto, by registered or certified mail, to all tenants in its Homart shopping centers.

G. *It is further ordered,* That respondent, in its capacity as a

shopping center developer, advise the Commission in writing within sixty (60) days after respondent has knowledge of any occasion that:

1. a tenant disapproves the admission into any of respondent's shopping centers of any other retailer;

2. a tenant refuses to approve the renewal of another retailer's lease in any of respondent's shopping centers;

3. a tenant approves the admission of another retailer into any of respondent's shopping centers subject to conditions imposed by the tenant relating to the pricing, price ranges, fashion ranges, quality ranges, (b) price lines, (c) trade names, (d) store names, (e) trademarks, brands or lines of merchandise of retailers, or (f) identity of particular retailers, including the listing of particular retailers as examples of a category; and *further, provided,* that such area shall not exceed 150 lineal feet on each level of the center;

4. requires that reasonable standards of appearance, signs, maintenance and housekeeping be maintained in a shopping center;

5. establishes a layout of a shopping center which layout may designate: (a) respondent's store and stores of other major tenants, (b) the location, size and height of all structures (including any structure that is to be occupied by only one tenant) but not the amount of floor area that any other tenant may occupy in the shopping center, (c) the use of all structures of a nonmerchandising nature, (d) the usage by square footage of leasable floor area in the shopping center (excluding floor area occupied by major tenants) of each type of merchandise or service to be handled or offered for sale, for which the developer will use his best efforts to obtain tenants, and (e) parking areas, roadways, utilities, entrances, exits, walkways, malls, landscaped areas and other common areas, and (f) expansion areas and may within such areas establish a layout incorporating items (a) through (e) of this subsection 5; or

6. requires that any expansion of the shopping center not provided for in the initial layout:

(a) shall not interfere with efficient automobile and pedestrian traffic flow into and out of the shopping center and between respondent's store and perimeter and access roads, parking areas, malls and other common areas of the shopping center;

(b) shall not interfere with the efficient operation of respondent's store, including its utilities or its visibility from within the shopping center or from public highways adjacent thereto;

(c) shall not result in a change of (i) the shopping center's parking ratio, (ii) the location of a number of parking spaces ranges, trade names, store names, trademarks, brands or lines of merchandise or the discounting practices or methods of such other retailer; or

4. a tenant enters into an Agreement or provision of an Agreement with respondent to become a tenant in any of respondent's shopping centers on condition that respondent refuse to renew the lease of another retailer.

IV

A. *It is further ordered,* That respondent shall within thirty (30) days after service of this order upon respondent distribute a copy of this order to each of its operating divisions.

B. *It is further ordered,* That respondent, in its capacity as a tenant, shall within thirty (30) days after service of this order upon respondent, distribute a copy thereof by registered or certified mail to each major tenant, shopping center joint venturer and developer in every shopping center in which respondent is a major tenant.

C. *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent or in its subsidiary Homart such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

D. *It is further ordered,* That respondent shall within sixty (60) days after service of this order upon respondent file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Commissioner Dole abstained, not having participated in the decision to provisionally accept this agreement. Commissioner Clanton dissented.

Dissenting Statement of Commissioner Clanton

I continue to adhere to my belief that the order, in its present form, should be rejected. Paragraph III E.5.(d) permits Sears to enter into agreements with shopping center developers that, *inter alia,* designate the layout of a shopping center, including "the usage by square footage of leasable floor area * * * of each type of merchandise or service to be handled or offered for sale for which the developer will use his best efforts to obtain tenants* * *." This exemption from the proscriptions of the order comes perilously close to conferring the kind of prior approval rights which the Commission struck down by its decision *In the Matter of Tysons Corner Regional Shopping Center, et al.,* 85 F.T.C. 970 (1975). While not authorizing the exclusion of identified prospective tenants, paragraph III E.5.(d) may achieve a

similar effect by enabling Sears to exercise veto power over various types of retail product lines and services (and thereby, perhaps, excluding certain classes of retailers) through the designation of allowable floor space.

As the Commission noted in *Tysons Corner:*

> It is almost self-evident, and the administrative law judge so found, that floor space is a crucial element in the ability of a store to compete (citation omitted). The inability to expand beyond a certain size can effectively preclude a retailer from offering a particular product line or services that would render it a more viable competitor for consumers' patronage. (Id. at 1013).

The interests of a tenant in the viability of a shopping center can be met, as the Commission pointed out in *Tysons Corner,* by spelling out in lease agreements "specific and legitimate considerations which a tenant may insist that developers consider in admitting new entrants, without creating the massive potential for price-fixing and anticompetitive exclusionary activity inherent in agreements conferring blanket approval rights* * *." Id. at 1012. (Footnote omitted). The Commission there distinguished between lease provisions giving a tenant broad rights of prior approval over other prospective entrants and those provisions setting forth well-defined entry criteria that are unlikely to constitute a cover for price-fixing and other price-controlling activities. In the latter situation, the burden would be on the tenant to demonstrate that the developer failed to give proper consideration to the relevant standards in the lease, a showing the Commission observed as "unlikely to be made or ever attempted if pricing policy is the main reason for the objection to the new competitor." Id. at 1018. By contrast, the *Sears* order permits major tenant participation in the design and layout of shopping centers in a way that renders effective enforcement of the order difficult if not impossible.

To the extent that appropriate consideration may be given to the economic viability of a proposed shopping center, the pending order contains several provisions outlining permissible lease arrangements similar to those incorporated in the *Tysons Corner* order; in fact, the order here would go further by permitting Sears to spell out in its lease agreement with a developer "reasonable categories of retailers" from which the developer would select tenants for location within the immediate proximity (150 feet) of Sears' store. (Paragraph III E.3.). To go beyond that, as provided in paragraph III E.5.(d), creates an unnecessary risk of anti-competitive exclusionary conduct.

For the above reasons, the order should not be approved.

IN THE MATTER OF

LAS ANIMAS RANCH, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2877. Complaint, Apr. 22, 1977 — Decision, Apr. 22, 1977

Consent order requiring seven Colorado Springs, Colo., sellers of undeveloped land, among other things, to cease misrepresenting the risks involved in land purchase; the location and quality of the land offered for sale; the costs and availability of utilities; and the advisability of consulting with a professional real estate expert prior to purchase. Further, the order requires respondents to cease failing to furnish the information required by Regulation Z of the Truth in Lending Act; provide a cooling-off period; advise buyers of their rights to cancellation and refund; and to institute a surveillance program designed to ensure compliance with the terms of the order.

Appearances

For the Commission: *Gerald H. Jaggers.*

For the respondents: *Ron J. Robinson, Walton, Robinson & Shields,* Colorado Springs, Colorado.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Las Animas Ranch, Inc., Mount Blanca Estates, Inc., Mount Blanca Valley Ranches, Inc., Chubasco, Inc., Pine Cone Properties, Inc., corporations; O'Keefe-Baldwin & Associates, Ltd., Trinchera Creek Estates, Ltd., general partnerships; and Charles R. Baldwin, individually and as an officer, stockholder and managing partner of said corporations and partnerships; hereinafter sometimes referred to as respondents, have violated provisions of said Acts and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect in the enumerated paragraphs below.

Allegations in the enumerated paragraphs of respondents' present acts and practices include respondents' past acts and practices. Allegations in said paragraphs of respondents' representations or statements include such representations and statements in sales

contracts, advertising, promotional materials or sales communications made orally, visually or in writing, directly or by implication.

PARAGRAPH 1. Respondent Las Animas Ranch, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Mount Blanca Estates, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Mount Blanca Valley Ranches, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Chubasco, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Pine Cone Properties, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent O'Keefe-Baldwin & Associates, Ltd. is a partnership existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Trinchera Creek Estates, Ltd. is a partnership existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondents Charles R. Baldwin and Danny W. O'Keefe are officers, managing partners, managers, or stockholders of the above corporations and partnerships. They formulate, direct and control the acts and practices of the corporate respondents and the partnership respondents. Their business address is 2860 South Circle Drive, Colorado Springs, Colo.

PAR. 2. Respondents are engaged in the business of acquiring undeveloped land and subdividing said land into lots; and advertising, offering for sale and selling said lots to the public.

PAR. 3. Respondents' volume of business is substantial and their acts and practices, as hereinafter set forth, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of land.

PAR. 5. Among the subdivisions owned or formerly owned by respondents in which lots have been or are being offered for sale by respondents are the subdivisions known as Mount Blanca Estates, Mount Blanca Valley Ranches, Las Animas Ranch, Trinchera Creek Estates and Mountain View Ranches, all located in the State of Colorado. The acreage of each of these subdivisions is substantial. Respondents formerly acted as a sales agent for a Colorado subdivision known as San Luis Estates.

COUNT ONE

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Three and Four hereof, are incorporated by reference in Count One as if fully set forth verbatim.

PAR. 6. In the conduct of their aforesaid business, respondents represent that the lots which respondents offer for sale are good investments and that there is little or no financial risk involved in the purchase of said lots.

PAR. 7. In truth and in fact, significant number of the aforesaid lots are not good investments involving little or no financial risk to purchasers from respondents. Therefore, the acts and practices described in Paragraph Six are unfair or deceptive.

PAR. 8. In the further conduct of their aforesaid business, respondents offer for sale and sell lots in their subdivisions without disclosing to prospective purchasers that the purchase of said lots is a risky investment in that, *inter alia,* the future value of said lots is uncertain and the purchaser will probably be unable to resell his or her lot at or above the purchase price. Therefore, respondents have failed to disclose material characteristics of their lots which would be likely to affect the consideration by purchasers of whether or not to purchase a lot from respondents. The failure to disclose such information is an unfair or deceptive act or practice.

PAR. 9. In the further conduct of their aforesaid business, respondents represent that the value of the undeveloped land and lots in their subdivisions is growing at a rate which corresponds to the growth rate of the value, at the undeveloped stage, of land and lots in more fully developed and populated areas.

PAR. 10. In truth and in fact, the growth rate of the value of the undeveloped land and lots in respondents' subdivisions does not

correspond to the growth rate of the value, at the undeveloped stage, of land and lots in more fully developed and populated areas referred to in Paragraph Nine. Therefore, the acts and practices described in Paragraph Nine are unfair or deceptive.

PAR. 11. In the further conduct of their aforesaid business, respondents represent that utilities, such as electricity and telephone, are presently available on the subdivisions, or that such utilities are located nearby, or that such utilities will be extended to prospective purchasers' lots at no additional cost to them, or that prospective purchasers will be able to obtain such utilities at a nominal cost.

PAR. 12. In truth and in fact, most of the lots sold by respondents are located a great distance from existing utility lines; no current plan exists to extend such lines to purchasers' lots; and, in addition to nominal hook-up or installation charges, purchasers must pay substantial expenses for utility line extension, plus sign longterm use contracts with local utility companies. Therefore, the acts and practices described in Paragraph Eleven are unfair or deceptive.

PAR. 13. In the further conduct of their aforesaid business, respondents represent that water may be obtained on each lot by drilling a well, or that the State of Colorado guarantees the availability of water or will automatically grant well drilling permits, or that drinkable water may be found at a shallow depth, 30 to 50 feet, and at nominal cost, and that water obtained may be used for any purpose.

PAR. 14. In truth and in fact, on most of the lots sold by respondents, sufficient drinkable water is either not available, or available only at excessive depths; the State of Colorado does not guarantee the availability of water, and on some lots, the State will not automatically issue well drilling permits; water permits are limited, in some areas, to domestic (in house) uses only; and drilling for water on many of respondents' lots involves substantial expense. Therefore, the acts and practices described in Paragraph Thirteen are unfair or deceptive.

PAR. 15. In the further conduct of their aforesaid business, respondents represent that the lots in respondents' subdivisions are useable as homesites.

PAR. 16. In truth and in fact, all or most of the aforesaid lots are not useable as homesites because of, *inter alia,* the lack or unreasonable cost of utilities, the difficulty in obtaining home construction financing, the remote location of the property and the poor quality of the land. Therefore, the acts and practices described in Paragraph Fifteen are unfair or deceptive.

PAR. 17. In the further conduct of their aforesaid business, respondents offer for sale and sell lots in their subdivisions without disclosing to prospective purchasers the total cost of all utilities, that one or more utility services may not be available and that home construction financing is difficult to obtain. Therefore, respondents have failed to disclose material characteristics of their lots which would be likely to affect the consideration by purchasers of whether or not to purchase a lot from respondents. The failure to disclose such information is an unfair or deceptive act or practice.

PAR. 18. In the further conduct of their aforesaid business, respondents represent that the land in their subdivisions will soon be unavailable and that prospective buyers must purchase lots immediately or risk being unable to do so.

PAR. 19. In truth and in fact, respondents' land is not selling at such a rate that prospective buyers cannot wait a substantial period of time and still be able to obtain land in the subdivision being offered. Therefore, the acts and practices described in Paragraph Eighteen are unfair or deceptive.

PAR. 20. In the further conduct of their aforesaid business, respondents represent that the money paid to respondents by purchasers is fully protected or "Guaranteed" by respondents' refund plan.

PAR. 21. In truth and in fact, the money paid to respondents by purchasers is not fully protected or "Guaranteed" by respondents' refund plan because of the conditions required of purchasers to get refunds including, but not limited to, the conditions that purchasers must bear the cost of traveling to the property and that purchasers must request a refund immediately upon completion of a required company guided tour when it may not be possible for purchasers to determine if the property is as represented at that time. Therefore, the acts and practices described in Paragraph Twenty are unfair or deceptive.

PAR. 22. In the further conduct of their aforesaid business, respondents represent that their subdivision land and the area in which said land is located is similar or comparable to urban, metropolitan and industrial areas as well as to mountain resort areas and recreation areas.

PAR. 23. In truth and in fact, respondents' land is not similar or comparable either to urban, metropolitan and industrial areas or to mountain resort areas or to recreation areas. Therefore, the acts and practices described in Paragraph Twenty-Two are unfair or deceptive.

PAR. 24. In the further conduct of their aforesaid business,

respondents represent that the subdivisions being sold are currently being developed or that many homes are now being built or will be built in the immediate future and that respondents or others are building or will build motels, resorts, ski areas and restaurants on or near the subdivisions.

PAR. 25. In truth and in fact, few permanent residences have been built on respondents' subdivisions and respondents have no plans to make additional improvements on their subdivisions. Therefore, the acts and practices described in Paragraph Twenty-Four are unfair or deceptive.

PAR. 26. In the further conduct of their aforesaid business, respondents represent that certain lots have been repossessed or forfeited, that the interest in such lots may be assumed by making certain back payments, and that purchasers are receiving credit for the equity or amount paid in by the previous purchaser of the lot.

PAR. 27. In truth and in fact, respondents offer no assumptions. The amounts identified by respondents as "assignment of equity" or "discount by credit" are, in fact, artificial or fictitious price reductions, and purchasers, in fact, pay the normal purchase price offered by respondents. Therefore, the acts and practices described in Paragraph Twenty-Six are unfair or deceptive.

PAR. 28. In the further conduct of their aforesaid business, respondents represent that no sales commission expense is involved in the purchase of respondents' lots and that, therefore, the purchase of respondents' lots is more economical when compared to other purchase or investment opportunities.

PAR. 29. In truth and in fact, respondents' salesmen do work on a commission basis. Therefore, the acts and practices described in Paragraph Twenty-Eight are unfair or deceptive.

PAR. 30. In the further conduct of their aforesaid business, respondents represent that lots in two subdivisions known as Las Animas Ranch may be used for any purpose desired by the purchasers thereof, including principal residence, mobile homes, resort developments or vacation homes.

PAR. 31. In truth and in fact, all or most of the lots in the Las Animas Ranch subdivisions are zoned "plains agriculture," requiring ownership of 320 acres before building of any sort is allowed. Therefore, the acts and practices described in Paragraph Thirty are unfair or deceptive.

PAR. 32. In the further conduct of their aforesaid business, respondents offer lots in their Las Animas Ranch subdivisions without disclosing to prospective purchasers that the lots being offered are zoned "plains agricultural," requiring ownership of 320

acres before building of any sort is allowed. Respondents, therefore, have failed to disclose material characteristics of their lots which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase a lot from respondents. The failure to disclose such information is a deceptive or unfair act or practice.

PAR. 33. In the further conduct of their aforesaid business, respondents use land sales contracts which contain declarations that the contract contains the entire agreement of the parties and that no representations were made to the lot purchaser to induce said purchaser to enter into the contract other than those representations expressed in the contract.

PAR. 34. Use by respondents of the contract declarations described in Paragraph Thirty-Three is an unfair or deceptive act or practice because respondents and their agents make representations which differ in material respects from, or which obscure, the rights and obligations of purchasers and respondents under said contracts.

PAR. 35. In the further conduct of their aforesaid business, respondents use land sales contracts which contain a provision that defaulting purchasers forfeit all payments previously made to respondents under the contract. When purchasers default and forfeit previously made payments, respondents retain and fail to offer refunds of those amounts of the purchasers' total payments which exceed respondents' reasonable damages caused by the defaults.

PAR. 36. Use by respondents of the contract provision described in Paragraph Thirty-Five and the retaining by respondents of purchasers' payments in excess of reasonable damages are unfair acts or practices.

PAR. 37. In the further conduct of their aforesaid business, respondents induce members of the public through the unfair and deceptive acts and practices, described in the enumerated paragraphs above, to pay to them, in advance of the passage of title, substantial sums of money toward the purchase of lots located within respondents' subdivisions. Said lots are of little or no use or value to purchasers as investments or as homesites. Respondents retain said sums of money.

PAR. 38. Respondents' retaining of the sums of money obtained through the acts and practices described in Paragraph Thirty-Seven is an unfair act or practice.

PAR. 39. The use by respondents of the aforementioned unfair or deceptive statements, representations, and practices has the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements are true and to cause the purchase of substantial

numbers of respondents' lots because of said mistaken and erroneous belief.

PAR. 40. The aforementioned acts and practices, as herein alleged, are all to the prejudice and injury of the public and respondents' competitors and constitute unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT TWO

Alleging violations of the Truth in Lending Act and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count Two as if fully set forth verbatim.

PAR. 41. In the further conduct of their aforesaid business, respondents regularly extend consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 42. Subsequent to July 1, 1969, respondents, in the conduct of their aforesaid business and in connection with credit sales as "credit sales" is defined in Section 226.2(n) of Regulation Z, have caused their customers to execute installment contracts, or contracts for deed. By and through the use of these contracts, respondents, in a number of instances:

1. Have failed to state the number, amount and the due dates or period of payments scheduled to repay the indebtedness, and the sum of such payments, using the term "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

2. Have failed to use the terms "cash downpayment," "total downpayment" and "unpaid balance of cash price," and have failed to give the corresponding disclosures with those terms, as required by Sections 226.8(c)(1), 226.8(c)(2) and 226.8(c)(3) of Regulation Z.

3. Have failed to use the term "deferred payment price," and to give the corresponding disclosure with that term, as required by Section 226.8(c)(8)(ii) of Regulation Z.

4. Have failed to use the term "finance charge," and to give the corresponding disclosure with that term, as required by Section 226.8(c)(8)(i) of Regulation Z.

5. Have failed to disclose the identity of the creditor, as required by Section 226.8(a) of Regulation Z.

6. Have failed to make the disclosures in the manner required by Sections 226.8(a)(1) and 226.8(a)(2) of Regulation Z.

7. Have failed to accurately disclose the "annual percentage rate," to the nearest quarter of one per cent, as required by Sections 226.5(b) and 226.8(b)(2) of Regulation Z.

8. Have failed to disclose whether a rebate of the unearned finance charges upon prepayment in full is available, and, if available, the method of computation, as required by Section 226.8(b)(7) of Regulation Z.

9. Have failed to use the term "annual percentage rate," as required by Section 226.8(b)(2) of Regulation Z.

10. Have failed to use the term "amount financed," as required by Section 226.8(c)(7) of Regulation Z.

PAR. 43. Subsequent to July 1, 1969, respondents, in the conduct of their aforesaid business and in connection with credit sales, have caused to be published advertisements, as "credit sale" and "advertisement" are defined in Section 226.2 of Regulation Z, which advertisements aid, promote or assist, directly or indirectly, the extension of other than open end credit.

PAR. 44. Respondents, in certain of these advertisements state the amount of the downpayment or that no downpayment is required, the amount of an installment payment, or the period of repayment, or that there is no charge for credit, without also stating all of the following items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2):

(a) the cash price;

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(d) the amount of the finance charge expressed as an annual percentage rate; and

(e) the deferred payment price.

PAR. 45. Respondents, in other advertisements state the rate of a finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z, and have not expressed said rate as an annual percentage rate, using the term "annual percentage rate," as "annual percentage rate" is defined in Section 226.2 of Regulation Z, in violation of Section 226.10(d)(1) of Regulation Z.

PAR. 46. By and through the use of a contract, respondents retain, create or acquire a security interest, as "security interest" is defined in Section 226.2(z) of Regulation Z, in real property which is expected or may be expected to be used as the principal residence of the

purchaser. Respondents' retention or acquisition of a security interest in said real property gives their customers, who are extended consumer credit, as "consumer credit" is defined in Section 226.2(k) of Regulation Z, the right to rescind the transaction until midnight of the third business day following the date of consummation of the transaction or the date of delivery of all the disclosures required by Regulation Z, whichever is later.

By and through the use of the aforementioned contract for deed, respondents in all instances since July 1, 1969:

1. Have failed to provide the "Notice of Opportunity to Rescind" to the customer on one side of a separate statement which identifies the transaction to which it relates, as required by Section 226.9(b) of Regulation Z.

2. Have failed to set out the "Effect of Rescission," Section 226.9(d) of Regulation Z in the manner and form required by Section 226.9(b) of Regulation Z.

PAR. 47. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act, and, pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Denver Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Truth in Lending Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission for purposes of this proceeding by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the

executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following findings, and enters the following order:

FINDINGS

1. Respondent Las Animas Ranch, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Mount Blanca Estates, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Mount Blanca Valley Ranches, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Chubasco, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Pine Cone Properties, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent O'Keefe-Baldwin & Associates, Ltd. is a partnership existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Trinchera Creek Estates, Ltd. is a partnership existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondents Charles R. Baldwin and Danny W. O'Keefe are officers, managing partners, managers or stockholders of the above corporations and partnerships. They formulate, direct and control the policies, acts and practices of said corporations and partnerships, and their business address is also 2860 South Circle Drive, Colorado Springs, Colo.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents, and the proceeding is in the public interest.

(Hereinafter, findings of present acts and practices include past acts and practices, and findings of representations include oral, written or visual communications, made directly or indirectly.)

3. Las Animas Ranch, Inc., subdivided approximately 15,000 acres of Colorado land and designated the subdivision as Las Animas Ranch.

4. Mount Blanca Valley Ranches, Inc., subdivided approximately 8,000 acres of Colorado land and designated the subdivision as Mount Blanca Valley Ranches.

5. Mount Blanca Estates, Inc., subdivided approximately 5,000 acres of Colorado land and designated the subdivision as Mount Blanca Estates.

6. Trinchera Creek Estates, Ltd., subdivided approximately 10,000 acres of Colorado land and designated the subdivision as Trinchera Creek Estates.

7. Chubasco, Inc., Pine Cone Properties, Inc., and O'Keefe-Baldwin & Associates, Ltd., acted as sales agents for the aforesaid subdivisions.

8. The aforesaid subdivisions were divided for the most part into five (5) acre lots, and lots in them were sold to members of the public located throughout the country.

9. Respondents represent that the lots which respondents offer for sale are good investments and that there is little or no financial risk involved in the purchase of said lots.

10. A significant number of the aforesaid lots are not good investments involving little or no financial risk to purchasers from respondents. Therefore, the acts and practices described in Finding 9 are unfair or deceptive.

11. Respondents offer for sale and sell lots in their subdivisions without disclosing to prospective purchasers that the purchase of said lots is a risky investment in that, *inter alia,* the future value of said lots is uncertain and the purchaser will probably be unable to resell his or her lot at or above the purchase price. Therefore, respondents have failed to disclose material characteristics of their lots which would be likely to affect the consideration by purchasers of whether or not to purchase a lot from respondents. The failure to disclose such information is an unfair or deceptive act or practice.

12. Respondents represent that the value of the undeveloped land and lots in their subdivisions is growing at a rate which corresponds to the growth rate of the value, at the undeveloped stage, of land and lots in more fully developed and populated areas.

13. The growth rate of the value of the undeveloped land and lots in respondents' subdivisions does not correspond to the growth rate of the value, at the undeveloped stage, of land and lots in more fully developed and populated areas referred to in Finding 12. Therefore, the acts and practices described in Finding 12 are unfair or deceptive.

14. Respondents represent that utilities, such as electricity and telephone, are presently available on the subdivisions, or that such utilities are located nearby, or that such utilities will be extended to prospective purchasers' lots at no additional cost to them, or that prospective purchasers will be able to obtain such utilities at a nominal cost.

15. Most of the lots sold by respondents are located a great distance from existing utility lines; no current plan exists to extend such lines to purchasers' lots; and, in addition to nominal hook-up or installation charges, purchasers must pay substantial expenses for utility line extension, plus sign long-term use contracts with local utility companies. Therefore, the acts and practices described in Finding 14. are unfair or deceptive.

16. Respondents represent that water may be obtained on each lot by drilling a well, or that the State of Colorado guarantees the availability of water or will automatically grant well drilling permits, or that drinkable water may be found at a shallow depth, 30 to 50 feet, and at nominal cost, and that water obtained may be used for any purpose.

17. On most of the lots sold by respondents, sufficient drinkable water is either not available, or available only at excessive depths; the State of Colorado does not guarantee the availability of water, and on some lots, the state will not automatically issue well drilling permits; water permits are limited, in some areas, to domestic (in house) uses only; and drilling for water on many of respondents' lots involves substantial expense. Therefore, the acts and practices described in Finding 16. are unfair or deceptive.

18. Respondents represent that the lots in respondents' subdivisions are useable as homesites.

19. All or most of the aforesaid lots are not useable as homesites because of, *inter alia,* the lack or unreasonable cost of utilities, the difficulty in obtaining home construction financing, the remote location of the property and the poor quality of the land. Therefore, the acts and practices described in Finding 18. are unfair or deceptive.

20. Respondents offer for sale and sell lots in their subdivisions without disclosing to prospective purchasers the total cost of all

utilities, that one or more utility services may not be available and that home construction financing is difficult to obtain. Therefore, respondents have failed to disclose material characteristics of their lots which would be likely to affect the consideration by purchasers of whether or not to purchase a lot from respondents. The failure to disclose such information is an unfair or deceptive act or practice.

21. Respondents represent that the land in their subdivisions will soon be unavailable and that prospective buyers must purchase lots immediately or risk being unable to do so.

22. Respondents' land is not selling at such a rate that prospective buyers cannot wait a substantial period of time and still be able to obtain land in the subdivision being offered. Therefore, the acts and practices described in Finding 21 are unfair or deceptive.

23. Respondents represent that the money paid to respondents by purchasers is fully protected or "Guaranteed" by respondents' refund plan.

24. The money paid to respondents by purchasers is not fully protected or "Guaranteed" by respondents' refund plan because of the conditions required of purchasers to get refunds including, but not limited to, the conditions that purchasers must bear the cost of traveling to the property and that purchasers must request a refund immediately upon completion of a required company guided tour when it may not be possible for purchasers to determine if the property is as represented at that time. Therefore, the acts and practices described in Finding 23 are unfair or deceptive.

25. Respondents represent that their subdivision land and the area in which said land is located is similar or comparable to urban, metropolitan and industrial areas as well as to mountain resort areas and recreation areas.

26. Respondents' land is not similar or comparable either to urban, metropolitan and industrial areas or to mountain resort areas or to recreation areas. Therefore, the acts and practices described in Finding 25 are unfair or deceptive.

27. Respondents represent that the subdivisions being sold are currently being developed or that many homes are now being built or will be built in the immediate future and that respondents or others are building or will build motels, resorts, ski areas and restaurants on or near the subdivisions.

28. Few permanent residences have been built on respondents' subdivisions and respondents have no plans to make additional improvements on their subdivisions. Therefore, the acts and practices described in Finding 27 are unfair or deceptive.

29. Respondents represent that certain lots have been repossessed

or forfeited, that the interest in such lots may be assumed by making certain back payments, and that purchasers are receiving credit for the equity or amount paid in by the previous purchaser of the lot.

30. Respondents offer no assumptions. The amounts identified by respondents as "assignment of equity" or "discount by credit" are, in fact, artificial or fictitious price reductions, and purchasers, in fact, pay the normal purchase price offered by respondents. Therefore, the acts and practices described in Finding 29 are unfair or deceptive.

31. Respondents represent that no sales commission expense is involved in the purchase of respondents' lots and that, therefore, the purchase of respondents' lots is more economical when compared to other purchase or investment opportunities.

32. Respondents' salesmen do work on a commission basis. Therefore, the acts and practices described in Finding 31 are unfair or deceptive.

33. Respondents represent that lots in two subdivisions known as Las Animas Ranch may be used for any purpose desired by the purchasers thereof, including principal residence, mobile homes, resort developments or vacation homes.

34. All or most of the lots in the Las Animas Ranch subdivisions are zoned "plains agriculture," requiring ownership of 320 acres before building of any sort is allowed. Therefore, the acts and practices described in Finding 33 are unfair or deceptive.

35. Respondents offer lots in their Las Animas Ranch subdivisions without disclosing to prospective purchasers that the lots being offered are zoned "plains agricultural," requiring ownership of 320 acres before building of any sort is allowed. Respondents, therefore, have failed to disclose material characteristics of their lots which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase a lot from respondents. The failure to disclose such information is a deceptive or unfair act or practice.

36. Respondents use land sales contracts which contain declarations that the contract contains the entire agreement of the parties and that no representations were made to the lot purchaser to induce said purchaser to enter into the contract other than those representations expressed in the contract.

37. Use by respondents of the contract declarations described in Finding 36 is an unfair or deceptive act or practice because respondents and their agents make representations which differ in material respects from, or which obscure, the rights and obligations of purchasers and respondents under said contracts.

38. Respondents use land sales contracts which contain a provision that defaulting purchasers forfeit all payments previously made

to respondents under the contract. When purchasers default and forfeit previously made payments, respondents retain and fail to offer refunds of those amounts of the purchasers' total payments which exceed respondents' reasonable damages caused by the defaults.

39. Use by respondents of the contract provision described in Finding 38 and the retaining by respondents of purchasers' payments in excess of reasonable damages are unfair acts or practices.

40. Respondents induce members of the public through the unfair and deceptive acts and practices, described in the enumerated findings above, to pay to them, in advance of the passage of title, substantial sums of money toward the purchase of lots located within respondents' subdivisions. Said lots are of little or no use or value to purchasers as investments or as homesites. Respondents retain said sums of money.

41. Respondents' retaining of the sums of money obtained through the acts and practices described in Finding 40 is an unfair act or practice.

42. The use by respondents of the aforementioned unfair or deceptive statements, representations, and practices has the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements are true and to cause the purchase of substantial numbers of respondents' lots because of said mistaken and erroneous belief.

43. The aforementioned acts and practices, as herein alleged, are all to the prejudice and injury of the public and respondents' competitors and constitute unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER

As used in this order, a requirement to cease and desist from representing or misrepresenting shall include representing or misrepresenting, directly or indirectly, and by any manner or means.

As used in this order, the term "subdivision" means:

> Land which has been or will be divided into 50 or more lots, whether contiguous or not, where said lots are bieng, have been, or will be offered for sale or lease as part of a common promotional plan.

I

It is ordered, That respondents Las Animas Ranch, Inc., Mount

Blanca Estates, Inc., Mount Blanca Valley Ranches, Inc., Chubasco, Inc., and Pine Cone Properties, Inc., corporations; O'Keefe-Baldwin & Associates, Ltd., and Trinchera Creek Estates, Ltd., general partnerships, their successors and assigns; and Charles R. Baldwin, individually and as an officer, managing partner and stockholder of said corporations and partnerships, and Danny W. O'Keefe, individually and as an officer, managing partner and stockholder of said corporations and partnerships, and respondents' officers, agents, representatives and employees, directly or through any corporation, partnership, subsidiary, division or other device, in connection with the advertising, offering for sale or sale of subdivisions, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting:

1. That real estate is a good or safe investment, or that the purchase of a lot in one of respondents' subdivisions is a good or safe investment.

2. That there is little or no financial risk involved in the purchase of respondents' lots.

3. That the resale of a lot purchased from respondents is not difficult.

4. That the value of, or demand for, any land, including lots being offered for sale or previously sold by respondents, has increased, or will or may increase, or that purchasers have made, or will or may in the future make, a profit by reason of having purchased respondents' land.

5. That the prices of respondents' lots periodically rise or that prices of said lots are increasing, have increased or will increase, without clearly and conspicuously disclosing at the same time, and by the same medium by which the price increases are communicated, that the price increases of respondents' lots do not in any way relate to the value of said lots.

6. That the purchase of a lot in one of respondents' subdivisions is a way to achieve financial security or prosperity, to deal with inflation or to become wealthy.

7. That the land in any of respondents' subdivisions will soon be unavailable or that prospective purchasers must purchase a lot in one of respondents' subdivisions immediately to ensure that such lot will be available.

8. That respondents' subdivision land and the area surrounding said land are comparable, similar or analogous either to urban, metropolitan and industrial areas or to mountain resort areas or to recreation areas.

9. That ski lifts, resorts, motels or other developments are planned on or near respondents' subdivisions, thereby increasing the value and desirability of the subdivisions.

10. That respondents will repurchase lots or resell lots for purchasers, unless such is a fact.

11. That lots being offered for sale have been repossessed, reduced in price, or may be purchased on an assumption basis, or that purchasers will be assigned or receive the benefit of a former purchaser's equity or payments.

12. That sales commissions are not paid to respondents' sales agents.

B. Including in any contract for the sale of respondents' land, or in any document shown or provided to purchasers or prospective purchasers of respondents' land:

1. Language to the effect that no express or implied representations have been made in connection with the sale or offering for sale of respondents' land, other than those set forth in the contract or document, or that any particular representation has not been made in such connection.

2. Language to the effect that upon a failure of the purchaser to pay any installment due under the contract or otherwise to perform any obligation under the contract, the seller shall be entitled to retain sums previously paid thereunder by the purchaser in excess of the seller's actual damages.

3. Any waiver, limitation or condition on the right of a purchaser to cancel a transaction or receive a refund under any provision of this order, except as such waiver, limitation or condition is expressly allowed by this order.

C. Misrepresenting the right of a purchaser under any provision of this order or any applicable statute or regulation to cancel a transaction or receive a refund.

D. Making any statement or representation, concerning the proximity of any city or place to a subdivision or a part thereof, without clearly disclosing in immediate conjunction therewith and with the same conspicuousness as such representation, the distance in road miles from the geographic center of the subdivision or part thereof to the other city or place referred to, including subtotals showing number of road miles paved and unpaved.

E. Misrepresenting the purpose or effect of any provision in the contract for sale, or other forms, completed at the time of sale or thereafter, whereby the purchasers are required to declare their intention as to establishing a permanent or principal place of residence on the land.

F. Misrepresenting the cost, availability or method of obtaining water, electric power, telephone or natural gas service, sewage treatment systems or any other type of improvement.

G. Misrepresenting, or failing to disclose, any type of zoning, covenant, easement, encumbrance, exception, reservation, restriction or condition or other matters of record which may significantly affect the use, enjoyment or value of lots sold by respondents.

H. Advertising for sale, offering for sale, contracting to sell or selling any interest in:

1. Subdivision lots represented in any manner as being useable now or in the future as a homesite, unless at the time of sale respondents include as a part of the sales contract a statement disclosing the then existing costs, availability, and feasibility of acquiring water, sewage disposal, electricity and telephone service for the lot being sold under such sales contract.

2. Any subdivision lots not covered in paragraph I.H.1. of this order unless;

a. There shall appear in the form and place described in paragraph II.C. of this order as an additional paragraph immediately following the first two paragraphs required by paragraph II.C., the following statement:

> THIS UNDEVELOPED LAND IS BEING SOLD "AS IS." ELECTRICITY, WATER, SEWER AND TELEPHONE SERVICE ARE NOT PLANNED FOR THIS SUBDIVISION AND MAY BE IMPOSSIBLE FOR YOU TO OBTAIN AT A REASONABLE COST. YOUR LOT WILL BE ACCESSIBLE, IF AT ALL, ONLY BY UNPAVED ROADS WHICH WILL NOT BE MAINTAINED BY US. THE USE OF SUCH ROADS MAY BE IMPOSSIBLE WITHOUT MAINTENANCE. AS A RESULT, YOUR LOT MAY HAVE NO USE AS A HOMESITE.

b. Each piece of advertising, sales or promotional material contains the following statement, in the same size type as that which is predominantly used in such material:

> LOTS IN THIS SUBDIVISION MAY NOT BE USEABLE AS HOMESITES

If respondents fail for any reason to make the disclosures required by the above paragraph (I.H.2.) of this order, they shall refund to each purchaser to whom the disclosures were not made all monies paid by such purchaser to respondents under the terms of the land sales contract when requested to do so by such purchaser.

II

It is further ordered, That respondents and respondents' officers, agents, representatives and employees, directly or through any

corporation, partnership, subsidiary, division or other device, in connection with the advertising, offering for sale or sale of subdivisions, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith:

A. Include clearly and conspicuously:

1. In all sales presentations, promotional materials and advertising, other than any TV or radio advertisements, in the same size type as that which is predominantly used in such material, the following statement:

> YOU SHOULD CONSIDER THE PURCHASE OF OUR LAND TO BE RISKY. THE FUTURE VALUE OF THIS LAND IS UNCERTAIN---DO NOT COUNT ON AN INCREASE IN ITS VALUE. IN THE PAST, IT HAS NOT ALWAYS BEEN POSSIBLE FOR PURCHASERS OF THIS LAND TO RESELL THE LAND AT A PROFIT.
>
> IT IS SUGGESTED THAT YOU DISCUSS ANY POSSIBLE PURCHASE WITH A LAWYER, REALTOR, OR OTHER QUALIFIED PROFESSIONAL.

2. In all TV and radio advertisements, the following statement:

> YOU SHOULD CONSIDER THE PURCHASE OF OUR LAND TO BE RISKY.

B. Set forth on the first page of any contract for the sale of land in 24-point boldface type, "CONTRACT FOR THE PURCHASE OF LAND," with no other writing except that required by paragraphs II.C. and I.H. of this order.

C. Print the following in 12-point boldface type as the only writing, in addition to that required by paragraphs II.B. and I.H. of this order, on the first page of all contracts for the sale of land:

> THIS IS A CONTRACT BY WHICH YOU AGREE TO PURCHASE LAND. THE FUTURE VALUE OF THIS LAND IS UNCERTAIN---DO NOT COUNT ON AN INCREASE IN ITS VALUE. YOU SHOULD NOT CONSIDER THIS PURCHASE AS A PROFITMAKING INVESTMENT. IN FACT, PURCHASERS MAY NOT BE ABLE TO RESELL THEIR LAND.
>
> IT IS SUGGESTED THAT YOU CONSIDER YOUR NEEDS CAREFULLY AND CONTACT A LAWYER, REALTOR OR OTHER QUALIFIED PROFESSIONAL ABOUT THIS PURCHASE.
>
> _____ _____
>
> Signature Date

No contract for the sale of respondents' land shall be valid unless this statement is signed and dated by the purchaser after he has had a reasonable amount of time to read the whole page.

D. Whenever respondents provide prospective purchasers with a

contract for the sale of land by any means other than by mailing said contract directly to such purchasers:

1. Furnish each purchaser, at the time the purchaser signs a contract for the sale of land, with two copies of a form, captioned in 12-point type "NOTICE OF RIGHT OF CANCELLATION," which shall contain in 10-point boldface type the following information and statements:

_____
Date of Transaction

_____
Contract Number

NOTICE OF CANCELLATION

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE SHOWN ON THE CONTRACT.

IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN TEN BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF THE CANCELLATION NOTICE.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO *(name of respondent)*, AT *(address of respondent's place of business)* NOT LATER THAN MIDNIGHT OF *(date)*.

I(WE) HEREBY CANCEL THIS TRANSACTION. (EACH PURCHASER MUST SIGN THIS NOTICE.)

_____ _____
(Date) (Signature of Purchaser)

2. Before furnishing copies of the above "Notice of Right of Cancellation" to the purchaser, complete both copies by entering the name of the respondent, the address of the respondent's place of business, the date of the transaction, the contract number and the date by which the purchaser may give notice of cancellation, but in no event may such date be earlier than the tenth business day following the date of the transaction.

3. Where a timely notice of cancellation is received and said notice is not properly signed, and respondents do not intend to honor the notice, immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of his error and stating clearly and conspicuously that a notice signed by the purchaser must be mailed by midnight of the seventh business

day following the purchaser's receipt of the mailing if the purchaser is to obtain a refund.

4. Where the signature of prospective purchaser is solicited during the course of a sales presentation, inform each person orally, at the time he signs the contract, of his right to cancel as stated in paragraph II.D. of this order.

5. Include clearly and conspicuously in each contract for the sale of respondents' land the following statement in 12-point boldface type:

> PURCHASER HAS THE RIGHT TO CANCEL THE CONTRACT, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE OF THIS CONTRACT. SEE THE ATTACHED "NOTICE OF RIGHT OF CANCELLATION" FOR AN EXPLANATION OF THIS RIGHT.

6. Within 10 business days after the receipt of a timely notice of cancellation signed by a purchaser, refund all payments made under the contract and cancel and return any negotiable instrument executed by the purchaser in connection with the contract.

E. Whenever respondents provide prospective purchasers with a contract for the sale of land by mailing said contract directly to such purchasers:

1. Include clearly and conspicuously in each contract for the sale of respondents' land the following statement in 12-boldface type:

> THIS OFFER OF LAND TO YOU WILL REMAIN OPEN FOR THIRTY CALENDAR DAYS FROM THE DATE OF YOUR RECEIPT OF THE CONTRACT, AND WE WILL ACCEPT ANY CONTRACT MAILED TO US WITHIN SAID THIRTY DAY PERIOD.

2. Honor any contract which is signed and mailed to respondents by purchaser within thirty calendar days from the date purchaser received it.

F. Furnish any report required by federal or state law to be furnished to a purchaser of respondents' land at or before the signing of a contract, and all materials required to be furnished by this order, with the first written materials or during the first contact which the prospective purchaser has with respondents or any of their agents or employees.

G. Inform all prospective purchasers that home financing may not be available, and that a bank located near the subdivision should be consulted prior to the purchase of land if the purchaser intends to build a house on that land.

H. Whenever respondents offer a refund contingent upon the purchaser taking a company-guided inspection tour or making a

registered inspection of the property in which the purchaser's lot is located:

1. Provide the purchaser three business days after taking said tour or making said inspection within which to request a refund.

2. Include in any contract, in immediate proximity to the provision setting forth the availability of a refund upon the completion of a company-guided inspection tour or registered inspection of the property, the following statements:

a. YOU, THE PURCHASER(S), HAVE THE RIGHT TO CANCEL THIS TRANSACTION IF YOU TAKE THE COMPANY-GUIDED TOUR OR MAKE A REGISTERED INSPECTION OF THE PROPERTY AND NOTIFY THE COMPANY PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF SUCH TOUR OR INSPECTION.

b. SELLER WILL *NOT* REIMBURSE THE PURCHASER(S) FOR ANY EXPENSES INCURRED BY THE PURCHASER(S) IN TRAVELLING TO THE PROPERTY IN ORDER TO TAKE THE TOUR OR INSPECTION.

3. Furnish each purchaser at the completion of the tour or inspection a completed form in duplicate, captioned "NOTICE OF CANCELLATION"which shall contain in at least 10-point boldface type the following statements:

NOTICE OF CANCELLATION

_____

Date of company-guided inspection tour or registered inspection of property

_____

Contract number

YOU MAY CANCEL YOUR CONTRACT WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE ABOVE DATE.

IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE.

TO CANCEL YOUR CONTRACT, MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO: *(name of respondent),* AT *(address of respondent's place of business)* NOT LATER THAN MIDNIGHT OF (date).

I (WE) HEREBY CANCEL THE CONTRACT. (EACH PURCHASER MUST SIGN THIS NOTICE.)

(Date)

_____

(Purchaser's signature)

4. Before furnishing the purchaser copies of the "Notice of Cancellation" set forth in paragraph II.H. of this order, complete both copies by entering the name of the respondent and the address of its place of business, the date of the company-guided inspection tour or the registered inspection of the property, and the date by which the purchaser may give notice of cancellation, but in no event shall that date be earlier than the third business day following the date of said tour or inspection.

5. Where a timely notice of cancellation is received purportedly in accordance with the requirements of this paragraph of this order, but where said notice is not properly signed, and respondents do not intend to honor the notice, immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of this error and stating clearly and conspicuously that a notice signed by the purchaser must be mailed by midnight of the seventh day following the purchaser's receipt of the mailing if the purchaser is to obtain a refund.

6. Orally inform the purchaser at the time the contract is signed and at the time the tour is taken or the inspection is registered of this cancellation right.

7. Provide an additional notice of cancellation as prescribed in subparagraph 3 above to purchasers not on a tour and purchasers who withdraw from tours, (1) who have completed their registration inspections, (2) who are invited to remain in the area and (3) who meet again with respondents or their agents. Said notice shall be provided to these purchasers on the day of the last such meeting. The notice shall be completed as required by subparagraph 4. above except the date by which the purchaser may give notice of cancellation shall not be earlier than the third business day following the date of the last such meeting.

For the purpose of determining the date after which the cancellation period shall begin to run, the termination date of the tour shall be controlling for all purchasers on a tour. The termination date of the tour for any purchaser who withdraws from a tour shall be the date he notifies respondents or their agents of his decision. For purchasers not on a tour, the date of the registered inspection shall be controlling.

III

It is further ordered, That in the event that any respondent transfers all or a substantial part of its subdivision land to any other person, partnership or corporation, or transfers all or part of its ownership interest in any or all of its wholly-owned subsidiaries, respondents shall require the transferee to file promptly with the Commission a written agreement to be bound by all the terms of this order including this one; *provided,* that, if respondents wish to present to the Commission any reasons why said order should not apply in its present form to said transferee, they shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said succession or transfer.

IV

It is further ordered, That respondents and respondents' officers, agents, representatives and employees, directly or through any corporation, partnership, subsidiary, division or other device, in connection with any extension (or arrangement for the extension) of consumer credit, or any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "advertisement" and "consumer credit" are defined in Regulation Z (12 CFR 226) of the Truth in Lending Act (15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

A. Failing to:

1. State the number, amount and the due dates or period of payments scheduled to repay the indebtedness, and the sum of such payments, using the term "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

2. Use the terms "cash downpayment," "total downpayment" and "unpaid balance of cash price," and to give the corresponding disclosures with those terms, as required by Section 226.8(c)(1), 226.8(c)(2) and 226.8(c)(3) of Regulation Z.

3. Use the term "deferred payment price," and to give the corresponding disclosure with that term, as required by Section 226.8(c)(8)(ii) of Regulation Z.

4. Use the term "finance charge," and to give the corresponding disclosure with that term, as required by Section 226.8(c)(8)(i) of Regulation Z.

5. Disclose the identity of the creditor as required by Section 226.8(a) of Regulation Z.

6. Make the disclosures in the manner required by Section 226.8(a)(1) or Section 226.8(a)(2) of Regulation Z.

7. Accurately disclose the "annual percentage rate," to the nearest quarter of one per cent, as required by Sections 226.5(b) and 226.8(b) (2) of Regulation Z.

8. Disclose whether a rebate of the unearned finance charges upon prepayment in full is available and, if available, the method of computation as required by Section 226.8(b)(7) of Regulation Z.

9. Use the term "annual percentage rate," as required by Section 226.8(b)(2) of Regulation Z.

10. Use the term "amount financed," as required by Section 226.8(c)(7) of Regulation Z.

11. In any transaction subject to Section 226.9 of Regulation Z, provide the customer with the notice of right to rescind, in the form and manner provided in that Section prior to consummation of the transaction.

B. Representing in any advertisement the amount of the downpayment or that no downpayment is required, the amount of an installment payment, or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

1. The cash price;

2. The amount of the downpayment required or that no downpayment is required, as applicable;

3. The number, amount and due dates or periods of payments scheduled to repay the indebtedness if the credit is extended;

4. The amount of the finance charge expressed as an annual percentage rate; and

5. The deferred payment price.

C. Stating in any advertisement the rate of a finance charge unless said rate is expressed as an annual percentage rate, using the term "annual percentage rate," as "finance charge" and "annual percentage rate" are defined in Section 226.2 and as required by Section 226.10(d)(1) of Regulation Z.

V

It is further ordered, That respondents deliver, by certified mail, a copy of this decision and order to each of their present or future salesmen and other employees, independent brokers and all others who sell or promote the sale of lots in respondents' subdivisions, and, as to each such person:

1. Provide them with a form, returnable to the respondents and to the Commission, clearly stating the intention to be bound by and to conform business practices to the requirements of this order.

2. Inform them that respondents:

a. Shall not use any person, or the services of any person, to sell or promote the sale of real estate unless such person agrees to and does file notice with the respondents and the Commission that it will be bound by the provisions contained in this order.

b. Are obligated by this order to discontinue dealing with those persons who continue on their own the unfair or deceptive acts or practices prohibited by this order or fail to adhere to the affirmative requirements of this order.

3. Institute a program of continuing surveillance adequate to reveal whether their business operations conform to the requirements of this order.

4. Discontinue dealing with, using or using the services of such persons who:

a. Do not file notice with the respondents and Commission of their intent to comply with, and be bound by, this order.

b. Are revealed by the aforesaid program of surveillance or by any other means to have continued on their own the unfair or deceptive acts or practices prohibited by this order; provided that, if remedial action is taken, evidence of such dismissal or termination shall not be admissible in any proceeding brought to recover penalties for alleged violation of any other paragraph of this order.

VI

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate and partnership respondents, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or partnership, the creation or dissolution of subsidiaries or any other change in the corporations or partnerships which may affect compliance obligations arising out of this order.

IN THE MATTER OF

NATIONAL ACCOUNT SYSTEMS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE TRUTH IN LENDING ACTS

Docket C-2884. Complaint, Apr. 22, 1977 --- Decision, Apr. 22, 1977

This consent order, among other things, requires a Chicago, Illinois, debt collection agency, and its subsidiaries, to cease using unfair and deceptive debt collection tactics; failing to disclose, in connection with the extension of consumer credit, such disclosures as are required by Federal Reserve Board regulations; and obtaining consumer credit information under false pretenses. Further, the order requires the return or destruction of unauthorized consumer credit information; the maintenance of certain prescribed records; and the establishment and maintenance of a surveillance program designed to insure the firm's employees comply with the provisions of the order.

Appearances

For the Commission: *Kenneth H. Donney.*

For the respondent: *Frank C. Christl, Gendel, Raskoff, Shapiro & Quittner,* Los Angeles, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that National Account Systems, Inc., a corporation, NAS Creditors Service, Inc., a corporation, National Accounts System of Milwaukee, Inc., a corporation, A. B. Hartman, Inc., a corporation, and Diners Club, Inc., a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

DEFINITIONS

PARAGRAPH 1. For the purpose of this complaint the following definitions apply:

(a) "consumer reporting agency," "agency," and/or "agencies"--- any person, partnership, corporation or association, which for monetary fees, dues or on a cooperative nonprofit basis, regularly

engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(b) "consumer report"---any written, oral or other communication of any information bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family or household purposes, (2) employment purposes, or (3) other purposes authorized under Section 604 of the Fair Credit Reporting Act.

(c) "subscriber"---any person, partnership, corporation or association who receives a consumer report from a consumer reporting agency and who is authorized to receive such report by using a subscriber code issued by the agency.

(d) "subscriber code"---any code or codes issued to subscribers by a consumer reporting agency; such codes are used for identification purposes to obtain a consumer report and the use of such codes may result in the subscriber being billed by said agency.

(e) "debts" or "debt"---any financial obligation, alleged financial obligation, delinquent account or alleged delinquent account owed by or allegedly owed by a consumer to a creditor.

PAR. 2. Respondent National Account Systems, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of Diners Club, Inc.

Respondent NAS Creditors Service, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of National Account Systems, Inc.

Respondent National Accounts System of Milwaukee, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its principal office and place of business located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of National Account Systems, Inc.

Respondent A. B. Hartman, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the

State of Delaware with its principal office and place of business located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of National Account Systems, Inc.

Respondent Diners Club., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 10 Columbus Circle, New York, New York.

Respondent National Account Systems, Inc. owns fifty percent (50%) of the stock of Indianapolis Account Service, Inc., an Indiana corporation, and directs and controls the acts and practices of Indianapolis Account Service, Inc., whose corporate mailing address is 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois, but whose principal place of business is 1308 North Meridian St., Suite 103, Indianapolis, Indiana.

PAR. 3. Respondents are now, and for some time in the past have been engaged in, among other activities, the practice of collecting or attempting to collect a substantial number of debts.

PAR. 4. In the course and conduct of their business, as aforesaid, respondents solicit and receive accounts for collection from business and professional people (hereinafter sometimes referred to as "creditors") located in various States of the United States, which accounts the respondents seek thereafter to collect from debtors located in various States of the United States. In the further course and conduct of their business, respondents transmit collection messages from their places of business located in various States of the United States. The respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. In the course and conduct of their business, and at all times mentioned herein, respondents have been and are now, in competition in or affecting commerce with other persons, partnerships and corporations in the attempted collection and collection of consumer debts on behalf of creditors.

COUNT I

The following allegations are made in respect to National Account Systems, Inc., NAS Creditors Service, Inc., National Accounts System of Milwaukee, Inc., and A. B. Hartman, Inc.

Alleging violations of Section 5 of the Federal Trade Commission Act, as amended, the allegations of Paragraphs One, Two, Three, Four and Five are incorporated by reference as if fully set forth herein verbatim.

PAR. 6. In the ordinary course and conduct of their business, as aforesaid, respondents are now, and for some time in the past, have been, using the subscriber codes owned by subscribers, such subscribers being unrelated to respondents. Respondents engage in said activities by telephoning a consumer reporting agency, and falsely representing, directly or by implication, that respondents are the subscribers of the subscriber codes, or that respondents are authorized to use the subscriber codes. This is done by communicating to said agency a subscriber code that is owned by, and is for the sole use of, one of said subscribers. Thus, the reporting agency is deceived as to the identity of the telephone caller. Respondents use said codes to obtain consumer reports from said agency, the obtaining of which under such false pretenses is unauthorized. Further, respondents do not pay for the consumer reports, but rather the true subscriber is sometimes charged by said agency for such consumer reports. Moreover, respondents are not subscribers to any consumer reporting agency in their own right.

PAR. 7. By and through the use of the aforesaid acts and practices, respondents have obtained information on consumers from consumer reporting agencies under false pretenses. Said acts and practices constitute unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 8. In the ordinary course and conduct of their business, as aforesaid, and for the purpose of inducing collection of said debts, respondents or their agents and employees make several oral and written representations, directly and by implication to many debtors and others. Typical and illustrative of these representations and statements, but not inclusive thereof, are the following:

1. That if said debtors do not pay their debts the debtors will go to jail.

2. That legal documents are being served upon said debtors.

3. That respondents or their agents are "ministers" and/or "insurance agents," and/or attorneys.

4. That respondents will destroy or harm said debtors' credit standings.

5. That if said debtors do not pay immediately the debtors will be sued by respondents.

6. That respondents will "garnish" the debtors' wages.

PAR. 9. By and through the use of the aforesaid statements and representations, and others of similar import and meaning, but not expressly set out herein, and with the sole intent of collecting debts

owed by debtors, respondents and their agents and employees represent and have represented, directly or by implication that:

1. The debtors will go to jail if they do not pay off the debts immediately.

2. The debtors have in their possession legal documents served upon them by respondents and therefore are being sued by respondents.

3. The respondents or their agents are "ministers" of some church and/or insurance agents of some company and/or attorneys.

4. The respondents will harm or destroy the debtors' credit standings if the debtors do not pay by a certain date.

5. The respondents will sue the debtors if the debtors do not pay by a certain date.

6. The respondents will garnish the debtors' wages if said debtors do not pay by a certain date.

PAR. 10. In truth and in fact,

1. The debtors will not go to jail if they do not pay their debts.

2. The debtors have not been served with legal documents and have not been sued but rather have received letters written by respondents which are drafted in such a way so as to appear to be legal documents.

3. Respondents or their agents are not ministers nor insurance agents nor attorneys but rather pretend to be in order to mislead the debtors.

4. Respondents have not decided to destroy or harm credit standings, and often respondents never take such actions.

5. Respondents have not decided to sue the debtors, and often respondents never take such action.

6. Respondents have not decided to garnish the debtors' wages, and often respondents never take such action.

Therefore, the uses of said statements and representations are false and misleading and constitute unfair methods of competition and unfair and deceptive acts and practices.

PAR. 11. In the further course and conduct of their business, and for the purpose of inducing the consumers to pay the debts, respondents' employees use abusive and obscene language when contacting consumers. In addition, respondents telephone the consumers' employers and urge the employers to pressure the consumers to pay the debts. Such actions by respondents constitute oppressive debt collection practices and therefore are unfair methods of competition and unfair acts and practices.

PAR. 12. The aforesaid acts and practices of the respondents, as herein alleged, are unethical, oppressive, exploitative and cause

substantial injury to consumers, and were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute, unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT II

The following allegations are made in respect to National Account Systems, Inc., NAS Creditors Service, Inc., National Accounts System of Milwaukee, Inc., and A. B. Hartman, Inc.

Alleging violations of the Truth in Lending Act and of the Federal Trade Commission Act, as amended, the allegations of Paragraphs One, Two, and Three are incorporated by reference as if fully set forth herein verbatim:

PAR. 13. In the ordinary course and conduct of their business, as aforesaid, respondents regularly arrange for the extension of consumer credit or offer to extend or arrange for the extension of such credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 14. Subsequent to July 1, 1969, in the further course and conduct of their business, as aforesaid, respondents have made and are making loans or have arranged for and are arranging for the making of loans which involve extensions of credit which are not credit sales. In these transactions respondents permit debtors or alleged debtors to repay their debts in more than four equal monthly installments for which respondents have been, and are charging many of their customers a finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z. Respondents do not provide these customers with consumer credit cost disclosures.

By and through the use of these methods, respondents:

1. Fail to disclose the finance charge expressed as an annual percentage rate, as "annual percentage rate" is defined in Section 226.2 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

2. Fail to disclose the date on which the finance charge begins to accrue, as required by Section 226.8(b)(1) of Regulation Z.

3. Fail to disclose the number, amount, and due date or periods of payments scheduled to repay the indebtedness and the sum of such payments using the term "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

4. Fail to disclose the total amount of finance charges, with a description of each amount included, using the term "finance charge" as required by Section 226.8(d)(3) of Regulation Z.

5. Fail to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

6. Fail to disclose the annual percentage rate accurately to the nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

7. Fail to make the disclosures required by Section 226.8 of Regulation Z clearly, conspicuously and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

PAR. 15. By and through the acts and practices set forth above, respondents National Account Systems, Inc., NAS Creditors Service, Inc., National Accounts System of Milwaukee, Inc. and A. B. Hartman, Inc., have failed and are now failing to comply with the requirements of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of the Act, and, pursuant to Section 108 thereof, respondents have violated the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Truth in Lending Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents

have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent National Account Systems, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of Diners Club, Inc.

Respondent NAS Creditors Service, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of National Account Systems, Inc.

Respondent National Accounts System of Milwaukee, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin with its principal office and place of business located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of National Account Systems, Inc.

Respondent A. B. Hartman, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of National Account Systems, Inc.

Respondent Diners Club, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 10 Columbus Circle, New York, New York. Diners Club, Inc. is joined as a respondent in that it is the sole owner of National Account Systems, Inc., and will be liable for civil penalty as provided in Paragraph 7 of the executed agreement in the event that any named respondent violates any of the provisions of Part IV of the order after it becomes final or in the event that National Account Systems, Inc., NAS Creditors Service, Inc., National Accounts System of Milwaukee, Inc., or A. B. Hartman, Inc., violate any of the other provisions of the order after it becomes final.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

National Account Systems, Inc., NAS Creditors Service, Inc., National Accounts System of Milwaukee, Inc., and A. B. Hartman, Inc., for the purposes of Parts I, II, and III of this order are the only parties to whom reference is made when the term "respondents" is used.

I

It is ordered, That National Account Systems, Inc., NAS Creditors Service, Inc., National Accounts System of Milwaukee, Inc., and A. B. Hartman, Inc., their successors and assigns, their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or branch, or other device in connection with the collection of or attempting to collect consumer debts, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Obtaining information on consumers from a consumer reporting agency or any other source under false pretenses.

2. Failing to keep accurate records of the sources of all information obtained on all consumers.

3. Retaining on respondents' premises any books, pamphlets, or any other writings or materials containing subscriber codes or any information which would enable respondents to use subscriber codes unless respondents or their employees or agents are:

(a) Members of a consumer reporting agency; and

(b) Authorized to possess and use such codes; such authorization must expressly include collecting or attempting to collect debts for respondents and such authorization must be maintained in respondents' files.

Any such codes or information currently in respondents' possession or which subsequently come into respondents' possession and are not permitted as required in (a) and (b) must be destroyed or returned to the authorized user and a record kept of such action for three years, making such record available to the Federal Trade Commission for inspection and copying upon request.

4. Representing in any manner, directly or by implication, orally or in writing, that respondents have the authority or right to cause debtors to go to jail or to be defendants in criminal prosecutions for not

paying their debts; or misrepresenting in any manner respondents' authority to affect debtors' legal rights or liabilities.

5. Representing in any manner, directly or by implication, orally or in writing, that respondents are serving legal or judicial documents upon debtors unless such is the case; or misrepresenting in any manner the status, significance or official nature of any papers sent to debtors.

6. Representing in any manner, directly or by implication, orally or in writing, that respondents or their agents are something or someone other than a debt collection agency or debt collector; or misrepresenting in any manner the official, professional or vocational status of respondents or their agents, or misrepresenting, in any manner, the position or function of any of respondents' agents, employees, and representatives.

7. Representing in any manner, directly or by implication, orally or in writing, that respondents will destroy or attempt to harm debtors' credit standings, or that respondents possess the authority or intend to disclose information regarding debtors to a consumer reporting agency; or misrepresenting in any manner the effect of any action taken by respondents on a debtor's credit standing.

8. Representing in any manner, directly or by implication, orally or in writing, that legal action has been initiated or is being initiated unless respondents have in fact instituted the legal action represented; or misrepresenting in any manner that legal action will be initiated, including but not limited to, attachment or garnishment proceedings, unless respondents are able to establish that at the time the representation was made respondents intended in good faith to institute the legal action represented.

9. Representing in any manner, directly or by implication, orally or in writing, that judgment may be entered against a debtor without the debtor having notice of the legal action and an opportunity to appear and defend himself or herself in a court of law.

10. Informing a debtor of a creditor's post judgment rights without disclosing at the same time that no judgment may be entered against the debtor unless the debtor has first been given notice and an opportunity to appear and defend himself or herself in a court of law.

11. Representing in any manner, directly or by implication, orally or in writing, the post judgment rights of a creditor unless said rights are in fact as specifically represented in the jurisdiction in which collection is sought; or misrepresenting in any manner, directly or by implication, the post judgment rights of a creditor.

12. Using abusive or obscene language when talking with or writing to debtors.

13. Placing any telephone call to any debtor, or orally contacting debtors in any manner, between the hours, in the time zone of the debtor, of 9:00 p.m. and 7:00 a.m. on weekdays, including Saturdays, and between the hours of 9:00 p.m. and 12:00 noon on Sundays.

14. Initiating more than two (2) oral conversations with any debtor in any one week regarding the collection of the same debt.

It is further ordered, That respondents, their successors and assigns, with respect to oral or written communications to persons other than the alleged debtor, cease and desist from:

(a) Communicating or threatening to communicate, or implying the fact or existence of any debt to a debtor's employer prior to any judgment;

(b) Communicating with or threatening to communicate, or implying the fact or existence of any debt to any other third parties, including former employers of the debtor other than one who might be reasonably expected to be liable therefor except with the written permission of the debtor or except where legal documents are being served according to law;

(c) Reporting a debt or an alleged debt to a consumer reporting agency unless respondents also promptly report to said consumer reporting agency the subsequent payment of said debt or alleged debt, or the resolution of any dispute concerning said debt, or alleged debt.

It is further ordered, That said respondents shall maintain for a period of three (3) years with respect to each debtor, records which shall consist of copies of all collection letters, dunning notices, requests for information and similar correspondence delivered to such debtor or third parties, or any indication of what items or documents were sent; a record or tabulation of all telephone calls made to or about the debtor showing the identity of the caller, the date of the call, the telephone number called, the purpose and result of the call and any notes or reports made in connection therewith when obtained; and copies of all documents pertaining to collection efforts such as referrals to lawyers or other agencies and legal documents utilized in collection efforts, or any indication of what items were sent.

II

It is ordered, That National Account Systems, Inc., NAS Creditors Service, Inc., National Accounts System of Milwaukee, Inc., and A. B. Hartman, Inc., their successors and assigns, their officers, agents,

representatives and employees, directly or through any corporation, subsidiary, division or branch, or other device, in connection with any consumer credit transaction, including, but not limited to, transactions involving the deferment of the payment of debts and/or the refinancing of any existing extension of credit or the increasing of existing obligations, as these terms are defined in Regulation Z (12 CFR 226) of the Truth in Lending Act (15 U.S.C. 1601-65 (1970), *as amended,* 15 U.S.C. 1601-65(a), (Supp. IV, 1974), do forthwith cease and desist from:

1. Failing to disclose the finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z, expressed and identified as an annual percentage rate, as "annual percentage rate" is defined in Section 226.2 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

2. Failing to disclose the date on which the finance charge begins to accrue, as required by Section 226.8(b)(1) of Regulation Z.

3. Failing to disclose the number, amount and due dates or periods of payments scheduled to repay the indebtedness and the sum of such payments using the term "total of payments" as is required by Section 226.8(b)(3) of Regulation Z.

4. Failing to disclose the total amount of finance charges, with a description of each amount included, using the term "finance charge," as required by Section 226.8(d)(3) of Regulation Z.

5. Failing to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

6. Failing to disclose the annual percentage rate accurately to the nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

7. Failing to make the disclosures required by Section 226.8 of Regulation Z clearly, conspicuously and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

8. Failing in any consumer credit transaction to make all disclosures, required by Sections 226.6, 226.7, 226.8, and 226.9 of Regulation Z, and failing to make all disclosures, determined in accordance with Section 226.4 and Section 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.7, 226.8, and 226.9 of Regulation Z.

III

It is further ordered, That:

(a) Respondents shall deliver a copy of this order to all present and future employees and their agents engaged in debt collection and to

any other person or entity connected with respondents to whom respondents presently refer or assign and to whom in the future respondents may refer or assign matters for debt collection;

(b) Respondents shall provide each of their employees with a form returnable to respondents clearly stating the employee's intention to conform his or her business practices to the requirements of this order; respondents shall require said persons to agree in writing on said form to conform his or her business practices to the requirements of this order and shall retain said statement during the period said person is so engaged, and for three (3) years thereafter, and make said statement available to representatives of the Federal Trade Commission for inspection and copying upon request;

(c) In the event such person will not agree to sign and file the form set forth in paragraph (b) above with respondents and conform to the provisions of this order, respondents shall not use or engage or continue the use or engagement of such person to collect debts or aid or assist respondents in the collection of debts;

(d) Respondents shall inform each person and entity described in paragraph (a) above that respondents shall not use or engage or shall terminate the use or engagement of any such person or entity unless such person or entity's business practices conform to the requirements of this order; and that respondents are obligated by this order to terminate the use or engagement of those persons or entities who engage on their own in the acts or practices prohibited by this order;

(e) Respondents shall institute a program of reasonable surveillance of their officers, employees and their agents engaged in debt collection, adequate to reveal whether the business practices of each said person conform to the requirements of this order;

(f) Upon receiving information from any source (including but not limited to respondents' program of surveillance, and representatives of the Federal Trade Commission) indicating reasonable proof of a violation of any provision of this order by any person or entity described in paragraph (a) above, respondents shall within 72 hours notify such person or entity by certified mail, return receipt requested, that such violation of this order has occurred ("Termination Notice"), and that respondents shall forthwith discontinue dealing with said person or entity. Immediately after such notification, respondents shall permanently discontinue dealing with said person or entity;

(g) Respondents shall retain evidence of compliance with this order and all Termination Notices and make such evidence available to representatives of the Federal Trade Commission for inspection and copying upon request;

(h) Respondents shall prepare and maintain a list of all employees containing the names of all such persons and their aliases, if any, and their last known addresses and telephone numbers for three (3) years following the date of their last employment with respondents; such list shall be made available to representatives of the Federal Trade Commission for inspection and copying upon request.

IV

It is further ordered, That respondents National Account Systems, Inc., a corporation, NAS Creditors Service, Inc., a corporation, National Accounts System of Milwaukee, Inc., a corporation, A. B. Hartman, Inc., a corporation, and Diners Club, Inc., a corporation, hereinafter referred to as respondents, shall not use independent agents or other entities knowingly for the purpose of circumventing any provision of this order.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in any of the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with more restrictive agreements, orders or directives of any kind obtained by any other governmental agency or act as a defense to actions instituted by municipal or state regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by, the Federal Trade Commission.

IN THE MATTER OF

THE AMERICAN MEDICAL ASSOCIATION, ET AL.

Docket 9064. Interlocutory Order, Apr. 26, 1977

Denial of respondents' motions that Commission reconsider issuance of complaint and for oral argument.

ORDER DENYING MOTIONS TO RECONSIDER ISSUANCE OF COMPLAINT

The complaint in this matter alleges that respondents have entered into agreements that, *inter alia,* prevent their members (medical doctors) from soliciting business, by advertising, or otherwise from engaging in price competition. The complaint further asserts that respondents have caused the agreements to be published and circulated in the *Principles of Medical Ethics* and have enforced these alleged restrictions.

The administrative law judge has now certified respondents' motions that the Commission reconsider issuance of the complaint. Respondents assert that even before the filing of the complaint, the conduct challenged in this proceeding had been terminated. Respondents note, for example, that the Judicial Council of the American Medical Association has reviewed the Association's position regarding advertising and solicitation by physicians and issued a "Statement on Advertising and Solicitation" which permits the making of information about physicians available to the public. The Statement indicates that information may be provided "through the accepted local media of advertising or communication, which are open to all physicians on like conditions." The Statement proscribes "solicitation," defined as "the attempt to obtain patients by persuasion or influence, using statements or claims that (1) contain testimonials, (2) are intended or likely to create inflated or unjustified expectations of favorable results, (3) are self-laudatory and imply that the physician has skills superior to other physicians engaged in his field or specialty of practice, or (4) contain incorrect or incomplete facts, or representations or implications that are likely to cause the average person to misunderstand or be deceived."

Respondents also argue that in view of the pendency on the Supreme Court's docket of *Bates* v. *State Bar of Arizona,* Dkt. No. 76–316 (argued Jan. 18, 1977), a case raising the question of the legality of state restrictions on advertising by attorneys, the Commission should "reexamine whether this is the time to intervene in efforts of

physicians to regulate themselves in a manner consistent with the public interest."

It is well-established that the mere fact that allegedly offending practices have been discontinued does not provide, by itself, the requisite assurance that an order is unnecessary and not in the public interest. *See, e.g., Zale Corp.*, 78 F.T.C. 1195, 1240 (1971). Moreover, it is not clear, without a full record, that the allegedly illegal practices challenged in the complaint have been completely terminated, for instance, whether, assuming respondents now authorize physicians to advertise, the remaining restrictions on the methods by which physicians can solicit patients are unfair methods of competition.

The Commission also does not believe that it would be in the public interest to stay these proceedings pending a determination of the *Bates* litigation. Accordingly,

It is ordered, That the aforesaid motions be, and they hereby are, denied.[1]

[1] The Commission denies respondents' motions for oral argument. The Commission also rejects as untimely the "Supplementary Memorandum in Support of Motion of Respondent American Medical Association for Reconsideration of Issuance of the Complaint" as well as complaint counsel's response.

IN THE MATTER OF

THE DINERS' CLUB, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2878. Complaint, Apr. 27, 1977 — Decision, Apr. 27, 1977

Consent order requiring, among other things, a New York City credit card company to cease failing to furnish customers with periodic statements setting forth credit balances; failing to notify customers of their right to request and receive cash refunds of such credit balances; failing to provide prescribed disclosure statements with credit balance notifications; and failing to make proper refunds as detailed in the order.

Appearances

For the Commission: *Roger J. Fitzpatrick, Hong S. Dea, Howard Daniels* and *John F. Lefevre.*

For the respondent: *Stuart M. Rosen, Weil, Gotshal & Manges,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Diners' Club, Inc., a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The Diners' Club, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 10 Columbus Circle, New York, New York.

PAR. 2. Respondent The Diners' Club, Inc. extends credit to consumers and others through the issuance of a credit card, hereinafter sometimes referred to as a Diners' Club card.

PAR. 3. Respondent The Diners' Club, Inc. maintains business offices located in several states. Respondent issues Diners' Club cards to persons throughout the United States and contracts with merchants to honor purchases made on Diners' Club cards in retail businesses throughout the United States. By these and other acts and practices, respondent maintains, and at all times mentioned herein has maintained, a substantial course of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of its aforesaid business, respondent, pursuant to an agreement with its cardholders, issues Diners' Club cards, valid for a designated period of time, which enable the cardholders to charge purchases of merchandise or services from subscribing hotels, restaurants, gasoline stations, and other retail businesses. Respondent purchases from such businesses obligations incurred by cardholders when such businesses honor the Diners' Club card. In turn, the cardholders agree to repay respondent by making payments on their Diners' Club charge accounts.

PAR. 5. On occasion a Diners' Club cardholder's charge account balance reflects a credit on the cardholder's account which represents an amount of money owed to the cardholder by respondent, rather than an amount of money owed to respondent by the cardholder. This credit balance is the result of, among other things, overpayments by the customer or credits given for the purchase price of returned merchandise.

PAR. 6. Typical and illustrative of respondent's practices in handling the credit balances of its cardholders are the following:

Respondent provides a cardholder having a credit balance on his active Diners' Club account with periodic statements setting forth the amount of the credit balance. At no time does respondent refund cash representing an outstanding credit balance to a cardholder unless the cardholder specifically requests the refund of his credit balance.

Respondent cancels Diners' Club card accounts when, for among other reasons, it is requested to do so by the cardholders or when the cardholders fail to renew their accounts upon the expiration of their established terms. Upon the cancellation of his account, a cardholder is thereafter unauthorized to utilize his credit balance by making offsetting purchases. When cancelling an account which reflects a credit balance, respondent has not refunded cash representing the outstanding credit balance without the cardholder's specific request. Following six consecutive months during which there has been no change in the amount of the credit balance on a cancelled account, respondent has not refunded the credit balance from the cardholder's account.

Through such acts and practices, respondent in a substantial number of instances has retained in its possession substantial dollar amounts of credit balances belonging to its cardholders.

PAR. 7. By failing to refund to its cardholders without their request credit balances reflected on accounts on which no activity has taken place for a substantial period of time, and by cancelling Diners' Club accounts which reflect outstanding credit balances and failing to

refund without request credit balances from inactive cancelled accounts, respondent has caused a substantial number of its cardholders and former cardholders to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Six above were and are unfair.

PAR. 8. The acts and practices of respondent set forth in Paragraphs Six and Seven above were and are to the prejudice and injury of the public and constitute unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The Diners' Club, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 10 Columbus Circle, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent The Diners' Club, Inc., a corporation, its successors and assigns and its representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on consumer credit accounts created incident to its business of issuing credit cards, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to mail or deliver to each of its cardholders having a credit balance created after the date of entry of this order a periodic statement setting forth such credit balance, no fewer than three times during the six-month period following the creation of the credit balance. *Provided, however,* that a periodic statement must be mailed or delivered as of the end of the first billing period during which the credit balance is created. *Provided further,* that no periodic statement need be sent once a credit balance is refunded or a fully offsetting purchase is made.

2. Failing to notify each cardholder having a credit balance created later than sixty (60) days from the date of entry of this order of his right to request and receive a cash refund in the amount of such credit balance, such notice to be accomplished by a clear and conspicuous disclosure on or enclosed with each periodic statement required by Paragraph One and accompanied by a return envelope. Such disclosure shall in all material respects be consistent with but need not be identical to the following:

"NO PAYMENT REQUIRED

The credit balance shown on the enclosed statement represents money we owe you. To obtain a refund, return the statement stub which contains your name and address, along with this notice, signed by you, in the enclosed envelope.

If you do not use your account or request a refund, a check will be mailed to you automatically within 7 months from the date this credit balance was created. But a credit balance of $1.00 or less will not be refunded unless specifically requested and after the 7 month period will not be credited against purchases.

To Diners Club

Please refund the credit balance shown on the enclosed statement.

(X) _____ Date _____"
Signature

Provided, however, that if respondent refunds without request credit balances of one dollar ($1.00) or less, the last sentence of such disclosure relating to such balances may be deleted.

If the disclosure furnished in compliance with this paragraph is not identical to the above-quoted statement, such disclosure shall provide all of the information contained in the above quotation, shall not provide any additional information relating to credit balances, shall be set forth separately from any other written matter, and shall be made either entirely on the face of the periodic statement or entirely on one side of a separate page. In the event such disclosure is not on the face of the periodic statement, then the periodic statement shall state clearly and conspicuously on its face: "Credit Balance. Do not pay. For refund see [enclosed instructions"] or [reverse side"], *provided, however* that this notice may be abbreviated.

3. Writing off or deleting from a cardholder's account any credit balance of more than one dollar ($1.00) created after the date of entry of this order before respondent has made a cash refund or the cardholder has made a fully offsetting purchase, unless such credit balance is not in fact owed to the cardholder, or unless respondent has complied with the requirements of Paragraph B below.

4. Failing to refund to each cardholder having a credit balance of more than one dollar ($1.00) created after the date of entry of this order, the full amount of said credit balance no later than thirty-one (31) days from the end of the sixth consecutive billing cycle during which a credit balance exists and the cardholder neither transacts any business on the account nor requests a refund, unless such credit balance is not in fact owed to the cardholder.

A. *It is further ordered,* That with respect to each credit balance owed to a Diners' Club cardholder in the amount of more than one dollar ($1.00) which was created at any time within the three-year period prior to the date of entry of this order and which has not been refunded to the cardholder as of the date of entry of this order, respondent shall refund to each such cardholder the full amount of such credit balance, unless such credit balance is not owed to the cardholder, or the cardholder makes a fully offsetting purchase within the period for compliance herewith. Respondent shall effect complete compliance with the provisions of this paragraph no later than seven (7) months after the date of entry of this order, and the

report required by Paragraph G of this order shall address itself specifically to the steps taken to comply with this paragraph.

B. *It is further ordered,* That each refund shall be given to the cardholder either in person or by mailing a check payable to the order of the cardholder to the last known address shown in respondent's records for said cardholder. Each periodic statement sent pursuant to the terms of this order shall be mailed to the cardholder at the last known address shown in respondent's records. In the event that any such statement or check is returned to respondent with a notification to the effect that the cardholder to whom it was mailed is not located at the address to which it was sent, respondent shall remail the check or statement with an address correction request to the Post Office, unless respondent has already done so. If the check or statement which has been remailed is returned to respondent and reflects an amount larger than fifteen dollars ($15.00), respondent shall obtain from a credit bureau the most current address available for the cardholder in the credit bureau's files by means of an in-file report or other credit bureau report. If a new address is obtained, respondent shall remail the check or statement to the cardholder. If the cardholder is not located by the preceding method, respondent shall reinstate the full amount of the credit balance on the cardholder's account to be retained until such time as the term of the account expires so that offsetting purchases can be made, and upon such reinstatement, respondent shall be relieved of any further obligation to send any additional notices and/or any refund without request with respect to the credit balance in question. In the event said cardholder should subsequently request a refund of any such credit balance, respondent shall treat such request in the manner provided in Paragraph C.

C. *It is further ordered,* That if a cardholder requests, in person or by mail, a refund of a credit balance in any amount at any time within six (6) years subsequent to the date on which the credit balance was created, respondent shall, within thirty (30) days from receipt of such request, either refund the entire amount requested, if owed, or furnish the cardholder with a written explanation, with supporting documentation, when available, of the reason(s) for refusing to refund the amount requested. Returning a periodic statement stub and signed credit balance notice to respondent shall constitute a request for refund of said credit balance.

D. *It is further ordered,* That a credit balance shall be deemed to be created at the end of the billing cycle in which the credit balance is first recorded on an account and at the end of the billing cycle in which the recorded amount of an existing credit balance is changed

due to a cardholder's use of the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such change shall automatically be terminated and replaced by its obligations under this order with respect to the new credit balance created by said change.

E. *It is further ordered,* That respondent shall maintain the following data: name and address of each Diners' Club cardholder who was sent a refund without request of a credit balance; the date the credit balance was created and the date it was refunded; and the amount of the credit balance. *Provided, however,* that respondent shall not be required to maintain such data for a period in excess of six years from the date such credit balance was refunded.

F. *It is further ordered,* That respondent shall, upon request, produce for the purpose of examination and copying by representatives of the Federal Trade Commission those records required to be retained by this order.

G. *It is further ordered,* That respondent shall, within ninety (90) days after the entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

H. *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

I. *It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

IN THE MATTER OF

CARTE BLANCHE CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2879. Complaint, Apr. 27, 1977 — Decision, Apr. 27, 1977

Consent order requiring a Los Angeles, Calif. credit card company to cease failing to furnish customers with periodic statements setting forth credit balances; failing to notify customers of their right to request and receive cash refunds of such credit balances; failing to provide prescribed disclosure statements with credit balance notifications; and failing to make proper refunds as detailed in the order.

Appearances

For the Commission: *Roger J. Fitzpatrick, Hong S. Dea, Howard Daniels* and *John F. Lefevre.*

For the respondent: *Stephen B. Friedman,* Los Angeles, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Carte Blanche Corporation, a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Carte Blanche Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3460 Wilshire Boulevard, Los Angeles, California.

PAR. 2. Respondent Carte Blanche Corporation extends credit to consumers and others through the issuance of a credit card, hereinafter sometimes referred to as a Carte Blanche card.

PAR. 3. Respondent Carte Blanche Corporation maintains business offices located in several states. Respondent issues Carte Blanche cards to persons throughout the United States and contracts with merchants to honor purchases made on Carte Blanche cards in retail businesses throughout the United States. By these and other acts and practices, respondent maintains, and at all times mentioned herein has maintained, a substantial course of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of its aforesaid business, respondent, pursuant to an agreement with its cardholders, issues Carte Blanche cards, valid for a designated period of time, which enable the cardholders to charge purchases of merchandise or services from subscribing hotels, restaurants, gasoline stations, and other retail businesses. Respondent reimburses such businesses for honoring the Carte Blanche card. In return, the cardholders agree to repay respondent by making payments on their Carte Blanche charge accounts.

PAR. 5. On occasion a Carte Blanche cardholder's charge account balance reflects a credit on the cardholder's account which represents an amount of money owed to the cardholder by respondent, rather than an amount of money owed to respondent by the cardholder. This credit balance is the result of, among other things, overpayments by the customer or credits given for the purchase price of returned merchandise.

PAR. 6. Typical and illustrative of respondent's practices in handling the credit balances of its cardholders are the following:

Respondent provides a cardholder having a charge account credit balance with only a single periodic statement setting forth the amount of his credit balance. The periodic statement is sent to the cardholder at the end of the billing cycle during which the credit balance is created. No additional periodic statement is provided to a cardholder for any billing cycle during which the credit balance is reflected on his account, unless he transacts business on his account.

At no time is a cardholder having a credit balance informed by respondent that he is entitled to request and receive a cash refund of his credit balance.

At no time does respondent refund cash representing an outstanding credit balance to a cardholder unless the cardholder specifically requests the refund of his credit balance.

Respondent closes Carte Blanche card accounts when, for among other reasons, it is requested to do so by the cardholders or when the cardholders fail to renew their accounts upon the expiration of their established terms. Upon closing an account which reflects a credit balance, a cardholder is thereafter unable to utilize his credit balance by making offsetting purchases; respondent does not inform the cardholder that he is entitled to request and receive a cash refund representing his outstanding credit balance, nor does respondent refund without request cash representing the outstanding credit balance of such closed accounts.

Through such acts and practices, respondent in a substantial

number of instances has retained in its possession substantial dollar amounts of credit balances belonging to its cardholders.

PAR. 7. By failing to notify Carte Blanche cardholders whose charge accounts reflect credit balances that they have the right to request and receive cash payment of the amounts of their credit balances; by failing to furnish Carte Blanche cardholders during billing cycles in which credit balances remain outstanding with a sufficient number of periodic statements disclosing the amount of their credit balances; by failing without their request to refund to its cardholders credit balances reflected on accounts on which no activity has taken place for a substantial period of time; and by closing Carte Blanche accounts which reflect outstanding credit balances without automatically refunding the credit balances, respondent has caused a substantial number of its cardholders and former cardholders to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Six above were and are unfair.

PAR. 8. The acts and practices of respondent set forth in Paragraphs Six and Seven above were and are to the prejudice and injury of the public and constitute unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed

consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Carte Blanche Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3460 Wilshire Boulevard, Los Angeles, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Carte Blanche Corporation, a corporation, its successors and assigns and its representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on consumer credit accounts created incident to its business of issuing credit cards, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to mail or deliver to each of its cardholders having a credit balance created after the date of entry of this order a periodic statement setting forth such credit balance, no fewer than three times during the six month period following the creation of the credit balance. *Provided, however,* that a periodic statement must be mailed or delivered during the first billing period succeeding the creation of the credit balance.

2. Failing to notify each cardholder having a credit balance created after the date of entry of this order of his right to request and receive a cash refund in the amount of such credit balance, such notice to be accomplished by a clear and conspicuous disclosure on or enclosed with each periodic statement required by Paragraph One and accompanied by a return envelope. Such disclosure shall in all material respects be consistent with but need not be identical to the following:

"NO PAYMENT REQUIRED

The Credit Balance shown on the enclosed statement represents money we owe you. You may obtain a refund by returning your statement in the enclosed envelope. If you do not charge against this credit or request a refund, a check will be mailed to you automatically within seven months after your credit balance was created. But a credit balance of one dollar ($1.00) or less will not be refunded unless specifically requested, and it will not be credited against future purchases after the seven month period." *Provided, however,* that if respondent refunds without request credit balances of one dollar ($1.00) or less, the last sentence of such disclosure may be deleted.

If the disclosure furnished in compliance with this paragraph is not identical to the above-quoted statement, such disclosure shall provide all of the information contained in the above quotation, shall not provide any additional information relating to credit balances, shall be set forth separately from any other written matter, and shall be made either entirely on the face of the periodic statement or entirely on one side of a separate page. In the event such disclosure is not on the face of the periodic statement, then the periodic statement shall state clearly and conspicuously on its face: "Credit balance. Do not pay. For refund see [enclosed instructions"] OR [reverse side"], *provided, however,* that this notice may be abbreviated.

3. Writing off or in any way deleting from a cardholder's account any credit balance of more than one dollar ($1.00) created after the date of entry of this order before respondent has made a cash refund or the cardholder has made a fully offsetting purchase, unless such credit balance is not in fact owed to the cardholder, or unless respondent has complied with the requirements of Paragraph B below.

4. Failing to refund to each cardholder having a credit balance of more than one dollar ($1.00) created after the date of entry of this order, the full amount of said credit balance no later than thirty-one (31) days from the end of the sixth consecutive billing cycle during which a credit balance exists and the cardholder neither transacts any business on the account nor requests a refund, unless such credit balance is not in fact owed to the cardholder.

Provided, however, that in the event that an account having a credit balance in any amount should be closed for any reason and the

cardholder has neither transacted any business on the account nor requested a refund, respondent shall refund the full amount of said credit balance no later than thirty-one (31) days from the effective date of the closing of the account. The mailing or otherwise delivering of a refund for the full amount of the customer's credit balance shall terminate respondent's responsibility to provide any periodic statements under Paragraph 1 of this order.

A. *It is further ordered,* That with respect to each credit balance owed to a Carte Blanche cardholder in the amount of more than one dollar ($1.00) which was created at any time within the three year period prior to the date of entry of this order, and which has not been refunded to the cardholder as of the date of entry of this order, respondent shall refund to each such cardholder the full amount of such credit balance, unless such credit balance is not owed to the cardholder, or the cardholder makes a fully offsetting purchase within the period for compliance herewith. Respondent shall affect complete compliance with the provisions of this paragraph no later than eight (8) months after the date of entry of this order, and the report required by Paragraph G of this order shall address itself specifically to the steps taken to comply with this paragraph.

B. *It is further ordered,* That each refund shall be given to the cardholder either in person or by mailing a check payable to the order of the cardholder to the last known address shown in respondent's records for said cardholder. Each periodic statement sent pursuant to the terms of this order shall be mailed to the cardholder at the last known address shown in respondent's records. In the event that any such statement or check is returned to respondent with a notification to the effect that the cardholder to whom it was mailed is not located at the address to which it was sent, respondent shall remail the check or statement with an address correction request to the Post Office unless respondent has already done so. If the check or statement which has been remailed is returned to respondent, and reflects an amount greater than fifteen dollars ($15.00), respondent shall obtain from a credit bureau the most current address available for the cardholder in the credit bureau's files by means of an in-file report or other credit bureau report. If a new address is obtained, respondent shall mail the check or statement to the cardholder at that address. If the cardholder is not located by the preceding method, respondent shall reinstate the full amount of the credit balance on the cardholder's account to be retained until such time the term of the account expires so that offsetting purchases can be made, and respondent shall be relieved of any further obligation to send any additional notice and/or any

refund with respect to the credit balance in question; provided, however, that in the event said cardholder should subsequently request a refund of any such credit balance respondent shall treat such request in the manner provided in Paragraph C.

C. *It is further ordered,* That if a cardholder requests, in person or by mail, a refund of a credit balance in any amount which had been reflected at any time on such cardholder's account, respondent shall, within thirty (30) days from receipt of such request, either refund the entire amount requested, if owed, or furnish the cardholder with a written explanation, with supporting documentation when available, of the reason(s) for refusing to refund the amount requested. The cardholder's return of a periodic statement which reflects a credit balance shall constitute a request for a refund of said credit balance.

D. *It is further ordered,* That a credit balance shall be deemed to be created at the end of the billing cycle in which the credit balance is first recorded on an account and at the end of the billing cycle in which the recorded amount of an existing credit balance is changed due to a cardholder's use of the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such change shall automatically be terminated and replaced by its obligations under this order with respect to the new credit balance created by said change.

E. *It is further ordered,* That respondent shall maintain a list which contains the following data: name and address of each Carte Blanche cardholder who received a refund of a credit balance without request; the date the credit balance was created and the date it was refunded; and the amount of the credit balance. Respondent shall also maintain a separate list which contains the following data: the names and addresses of all cardholders who requested in person or by mail a refund of a credit balance but whose request was refused; the date the request was made; the date a written explanation of the refusal was sent to the cardholder; a copy of the written explanation; and the amount of the claimed credit balance.

F. *It is further ordered,* That respondent shall, upon request, produce for the purpose of examination and copying by representatives of the Federal Trade Commission those records required to be retained by this order.

G. *It is further ordered,* That respondent shall, within ninety (90) days after the entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

H. *It is further ordered,* That respondent notify the Commission

at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

I. *It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its operating divisions.

IN THE MATTER OF

FEDERATED DEPARTMENT STORES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2880 Complaint, Apr. 27, 1977 — Decision Apr. 27, 1977

Consent order requiring a Cincinnati, Ohio, retailer to cease failing to furnish customers with periodic statements setting forth credit balances; failing to notify customers of their right to request and receive cash refunds of such credit balances; failing to provide prescribed disclosure statements with credit balance notifications; and failing to make proper refunds as detailed in the order.

Appearances

For the Commission: *Roger J. Fitzpatrick, Hong S. Dea, Howard Daniels* and *John F. Lefevre.*

For the respondent: *Harold P. Rosenberg,* in house counsel, Cincinnati, Ohio.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Federated Department Stores, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Federated Department Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 222 West 7th St., Cincinnati, Ohio. Respondent Federated Department Stores, Inc. is responsible for the formulation, control and direction of the policies, acts and practices of its divisions, including the acts and practices hereinafter set forth. Respondent's divisions include Abraham and Straus; Bloomingdale Bros.; Milwaukee Boston Store Co.; Bullock's; Bullock's North; Burdine's' William Filene's Sons Co.; Foley's; Goldsmith's; F. & R. Lazarus & Co.; Levy's of Tucson; I. Magnin & Co.; Rike's; Sanger-Harris; and Shillito's.

Abraham & Straus division operates ten department and specialty stores under the trade name Abraham & Straus. Its principal office

and place of business is located at 420 Fulton St., Brooklyn, New York.

Bloomingdale Bros. division operates twelve department and specialty stores under the trade name Bloomingdale's. Its principal office and place of business is located at Lexington Ave. and 59th St., New York, New York.

Milwaukee Boston Store Co. division operates six department and specialty stores under the trade name Boston Store. Its principal office and place of business is located at 331 W. Wisconsin Ave., Milwaukee, Wisconsin.

Bullock's division operates fifteen department and specialty stores under the trade name Bullock's. Its principal office and place of business is located at Broadway, Hill and 7th Sts., Los Angeles, California.

Bullock's North division operates three department stores under the trade name Bullock's North. Its principal office and place of business is located at 550 Stanford Shopping Center, Palo Alto, California (mailing address: P.O. Box 2007, Menlo Park, California 94025).

Burdine's division operates eleven department stores under the trade name Burdine's. Its principal office and place of business is located at 22 E. Flagler St., Miami, Florida.

William Filene's Sons Co. division operates eleven specialty stores under the trade name Filene's. Its principal office and place of business is located at 426 Washington St., Boston, Massachusetts.

Foley's division operates seven department and specialty stores under the trade name Foley's. Its principal office and place of business is located at 1110 Main St., Houston, Texas.

Goldsmith's division operates four department stores under the trade name Goldsmith's. Its principal office and place of business is located at 123 S. Main St., Memphis, Tennessee.

F. & R. Lazarus Co. division operates eleven department and specialty stores under the trade name Lazarus. Its principal office and place of business is located at S. High and W. Town Sts., Columbus, Ohio.

Levy's of Tucson division operates one department store under the trade name Levy's. Its principal office and place of business is located at El Con Shopping Center, Tucson, Arizona.

I. Magnin and Company division operates twenty-two specialty stores under the trade name I. Magnin. Its principal office and place of business is located at Union Square, San Francisco, California.

Rike's division operates five department stores under the trade

name Rike's. Its principal office and place of business is located at 2nd and Main Sts., Dayton, Ohio.

Sanger-Harris division operates nine department stores under the trade name Sanger-Harris. Its principal office and place of business is located at 303 N. Akard at Pacific, Dallas, Texas.

Shillito's division operates seven department stores under the trade name Shillito's. Its principal office and place of business is located at 7th and Race Sts., Cincinnati, Ohio.

PAR. 2. Respondent Federated Department Stores, Inc., through its aforesaid divisions, operates and controls a number of retail department and specialty stores in New York, Wisconsin, California, Florida, Massachusetts, Texas, Tennessee, Ohio and Arizona.

PAR. 3. Respondent Federated Department Stores, Inc. sells and distributes merchandise in commerce by operating and controlling retail department and specialty stores in a number of states and by causing merchandise to be shipped from its warehouses and retail department and specialty stores for distribution to and purchase by the general public located in states other than those from which such shipments originate. By these and other acts and practices, respondent maintains, and at all times mentioned has maintained, a substantial course of business in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of its aforesaid business, respondent permits customers of its operating divisions who qualify for credit to charge purchases to revolving credit accounts or other charge accounts. On occasion, a customer's charge account balance consists of a credit on the customer's account which represents an amount of money owed to the customer by one of respondent's divisions, rather than an amount of money owed to one of respondent's divisions by the customer. This credit balance may be the result of, among other things, overpayments by the customer or credits given for the purchase price of returned merchandise.

PAR. 5. Typical and illustrative of respondent's practices in handling the credit balances of its customers are the following: Respondent, through its divisions, provides each customer having a charge account credit balance with a periodic statement setting forth the amount of the credit balance; the statement is mailed at the end of the billing cycle during which the credit balance is created. A second periodic statement is mailed six months after the first. No additional periodic statement is provided to a customer for any billing cycle during which the credit balance is reflected on the account, unless business is transacted on the account.

If the customer does not request a refund in cash in the amount of

the credit balance or make a purchase within six months following the issuance of the first statement, respondent's divisions, through bookkeeping entries, may transfer the amount of the credit balance from the customer's charge account subject to automatic reinstatement. No cash payment to the customer is made at the time of the transfer of his credit balance from his charge account.

At no time do respondent's divisions refund cash representing an outstanding credit balance without request.

Through such acts and practices, respondent's divisions, in a substantial number of instances, have retained in their possession substantial dollar amounts of credit balances belonging to their customers.

PAR. 6. By failing to furnish to customers, during billing cycles in which credit balances of any amount remain outstanding, a sufficient number of periodic statements disclosing the amounts of their credit balances along with their right to request and receive cash payment of the amounts of their credit balances, and by failing to refund without request credit balances reflected on accounts on which no business has been transacted for a substantial period of time, respondent has caused a substantial number of its divisions' charge account customers to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Five above were and are unfair.

PAR. 7. The acts and practices of respondent, through its divisions, as set forth in Paragraphs Five and Six above, were and are to the prejudice and injury of the public and constitute unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such

complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Federated Department Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 222 West 7th St., Cincinnati, Ohio.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Federated Department Stores, Inc., a corporation, its successors and assigns and its representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on retail consumer revolving credit accounts or other retail consumer charge accounts (including, but not necessarily limited to thirty (30) day charge accounts) created incident to the business of selling consumer merchandise and services at retail, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to mail or deliver to each charge account customer having a credit balance created after the date of entry of this order a periodic statement setting forth such credit balance, no fewer than three times in the six-month period following the creation of the credit balance; *provided, however,* that a periodic statement must be mailed or delivered as of the end of the first billing period during which the credit balance is created and *provided,* further, that no periodic statement need be sent once a credit balance is refunded or a fully offsetting purchase is made.

2. Failing to notify each charge account customer having a credit balance created later than sixty (60) days from the date of entry of this order of the customer's right to request and receive a cash refund in the amount of such credit balance, such notice to be accomplished

by a clear and conspicuous disclosure on or enclosed with each periodic statement required by Paragraph (1) and accompanied by a return envelope. Such disclosure shall in all material respects be consistent with but need not be identical to the following:

"NO PAYMENT REQUIRED

[The Credit Balance shown on the enclosed statement] OR [This credit balance] represents money we owe you. You may obtain a refund by presenting your statement at our store or by returning it in the enclosed envelope. If you do not charge against this credit or request a refund, a check will be mailed to you in _____ months. But a credit balance of $1 or less will not be refunded unless specifically requested, and it will not be credited against future purchases after that _____ month period." *Provided, however,* if respondent refunds without request credit balances of one dollar ($1.00) or less, the last sentence of such disclosure may be deleted, and if respondent credits amounts under $1.00 against future purchases, the phrase "and it will not be credited against future purchases after the _____ month period," may be deleted.

If the disclosure furnished in compliance with this paragraph is not identical to the above-quoted statement, such disclosure shall provide all of the information contained in the above quotation, shall not provide any additional information relating to credit balances, shall be set forth separately from any other written matter, and shall be made either entirely on the face of the periodic statement or entirely on one side of a separate page. In the event such disclosure is not on the face of the periodic statement, then the periodic statement shall state clearly and conspicuously on its face: "Credit balance. Do not pay. For refund see [enclosed instructions"] OR [reverse side"], *provided, however,* that this notice may be abbreviated.

3. Writing off or deleting any credit balance of more than one dollar ($1.00) created after the date of entry of this order from a customer's account before respondent has made a cash refund or the customer has made a a fully offsetting purchase, unless such credit balance is not in fact owed to the customer, or unless respondent has complied with the requirements of Paragraph B below; *provided, however,* that if a credit balance is automatically credited against future purchases, that balance is not considered to be written off or deleted from a customer's account.

4. Failing to refund to each charge account customer with a credit balance of more than one dollar ($1.00) created after the date of entry

of this order the full amount of said credit balance no later than thirty-one (31) days from the end of the sixth consecutive billing cycle during which a credit balance exists and the customer neither transacts any business on the account nor requests a refund, unless such credit balance is not in fact owed to the customer.

A. *It is further ordered,* That with respect to each credit balance owed to a customer in the amount of more than one dollar ($1.00) which was created at any time within the three-year period prior to the date of entry of this order, and which has not been refunded to the customer as of the date of entry of this order, respondent shall refund to each such customer the full amount of such credit balance, unless such credit balance is not owed to the customer, or the customer makes a fully offsetting purchase within the period for compliance herewith; *provided, however,* that nothing contained herein shall prevent respondent from making such refund by giving a credit certificate(s), in the full amount of the credit balance which shall be redeemable, at the customer's option, in merchandise or cash. Such a certificate(s) shall clearly and conspicuously disclose on its face that it is redeemable for cash if the customer so requests in person or if the customer returns the certificate(s) by mail with a request for cash redemption. Respondent shall effect complete compliance with the provisions of this paragraph no later than seven (7) months after the date of entry of this order, and the report required by Paragraph I of this order shall address itself specifically to the steps taken to comply with this paragraph.

B. *It is further ordered,* That each refund shall be given to the customer either in person or by mailing a check (or credit certificate(s) in the case of credit balances existing prior to the date of entry of this order) payable to the order of the customer, to the last known address shown in respondent's records for said customer. Each periodic statement sent pursuant to the terms of this order shall be mailed to the customer at the last known address shown in respondent's records. In the event that any such statement or check (or credit certificate) is returned to respondent with a notification to the effect that the customer to whom it was mailed is not located at the address to which it was sent, respondent shall remail the check or statement (or credit certificate) with an address correction request to the Post Office unless respondent has already done so. If the check or statement (or credit certificate) which has been remailed is returned to respondent and reflects an amount larger than fifteen dollars ($15.00), respondent shall then obtain from a credit bureau the most current address available for the customer by means of an in-file report or other report of information then existing in the credit

bureau's file. If a new address is obtained, respondent shall remail the check or statement (or credit certificate) to the customer. If the customer is not located by the preceding method, respondent shall reinstate the full amount of the credit balance on the customer's account to be retained for one year from the date on which the remailed check or statement was returned so that offsetting purchases can be made and respondent shall be relieved of any further obligation to send any additional notice and/or any refund with respect to the credit balance in question. *Provided, however,* that in the event said customer should subsequently request a refund of any such credit balance, respondent shall treat such request in the manner provided in Paragraph C and *provided, further,* that respondent has the right pursuant to the Commission's Rules, to petition the Commission to request a reopening of this proceeding to seek modification of Paragraph B with respect to costs incurred in complying with the requirement of obtaining credit reports if respondent concludes that compliance with such requirement is economically burdensome or inequitable.

C. *It is further ordered,* That if a customer requests, in person or by mail, a refund of a credit balance in any amount which had been initially reflected on such customer's account at any time within six years preceding the date on which the refund request is made, respondent shall, within thirty (30) days from receipt of such request, either refund the entire amount requested, if owed, or furnish the customer with an individualized written explanation, with supporting documentation, when available, of the reason(s) for refusing to refund the amount requested. Mailing to respondent in the return envelope referred to in Paragraph (2) a periodic statement [or other form referred to in Paragraph (2)] which reflects a credit balance shall constitute a request for a refund of said credit balance.

D. *It is further ordered,* That, notwithstanding the foregoing, respondent may refund amounts of one dollar ($1.00) or less by refunding the cash equivalent in United States postage stamps unless the customer requests a cash refund. Along with and at the same time of such refund of stamps, respondent shall clearly and conspicuously disclose that if the customer prefers, the customer may receive cash, in lieu of stamps, if he notifies respondent by telephone, mail or in person. Respondent thereupon shall accept return of the stamps and shall promptly make the refund by check or cash.

E. *It is further ordered,* That a credit balance shall be deemed to be created at the end of the billing cycle in which the credit balance is first recorded on a customer's account and at the end of the billing cycle in which the recorded amount of an existing credit balance is

changed due to a customer's use of the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such change shall automatically be terminated and replaced by its obligations under this order with respect to the new credit balance created by said change.

F. *It is further ordered,* That, notwithstanding the foregoing, the provisions of this order shall not be applicable to credit balances on accounts administered by third parties or to transactions arising out of lay-away plans or installment sales contracts.

G. *It is further ordered,* That commencing not later than sixty days after the date of entry of this order, respondent shall maintain, for each of its retail operating divisions, the following data: the name and address of each customer who thereafter receives a refund of a credit balance; the date the credit balance was first reflected on the customer's account; the closing date of the billing cycle in which it was refunded; and the amount of the credit balance. Respondent shall also maintain for each of its retail operating divisions copies of all written explanations furnished pursuant to Paragraph C above. *Provided, however,* that respondent shall not be required to maintain the information required by this paragraph for a period in excess of six years from the date each individual credit balance was refunded or the date each individual explanation was furnished.

H. *It is further ordered,* That respondent shall, upon request, produce for the purpose of examination and copying by representatives of the Federal Trade Commission those records required to be retained by this order.

I. *It is further ordered,* That respondent shall, within ninety (90) days after the entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

J. *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

K. *It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its retail operating divisions.

IN THE MATTER OF

CITY STORES COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2881 Complaint, Apr. 27, 1977 — Decision, Apr. 27, 1977

Consent order requiring a New York City retailer to cease failing to furnish customers with periodic statements setting forth credit balances; failing to notify customers of their right to request and receive cash refunds of such credit balances; failing to provide prescribed disclosure statements with credit balance notifications; and failing to make proper refunds as detailed in the order.

Appearances

For the Commission: *Roger J. Fitzpatrick, Hong S. Dea, Howard Daniels* and *John F. Lefevre.*

For the respondent: *Stuart M. Rosen, Weil, Gotshal & Manges,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that City Stores Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent City Stores Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 500 Fifth Ave., New York, New York. Respondent, through its divisions and wholly-owned subsidiaries, operates a total of 149 department, specialty, and home furnishing stores.

Lit Brothers division operates eleven department stores under the trade name Lit Brothers. Its principal office and place of business is located at 8th and Market St., Philadelphia, Pennsylvania.

Maison Blanche division operates seven department stores under the trade name Maison Blanche. Its principal office and place of business is located at 901 Canal St. (Box 60820), New Orleans, Louisiana.

Richards division operates eight department stores under the trade

name Richards. Its principal office and place of business is 1 N.E. 1st St., Miami, Florida.

Loveman's division operates five department stores under the trade name Loveman's. Its principal office and place of business is located at 216 N. 19th St., Birmingham, Alabama.

Hearn's division operates a department store under the trade name Hearn's. Its principal office and place of business is located at 149th Street at 3rd Ave., Bronx, New York.

R. H. White's division operates two department stores under the trade name R.H. White's. Its principal office and place of business is located at Lincoln Plaza, Worcester, Massachusetts.

Franklin Simon division operates sixty-eight specialty stores under the trade name Franklin Simon. Its principal office and place of business is located at 560 Washington St., New York, New York.

B. Lowenstein & Bros. Inc., a wholly-owned subsidiary, operates four department stores under the trade name Lowenstein's. Its principal office and place of business is located at 85 N. Main St., Memphis, Tennessee.

W. & J. Sloane, Inc., a wholly-owned subsidiary, operates thirty-five home furnishing stores under the trade name W. & J. Sloane. Its principal office and place of business is located at 414 Fifth Ave., New York, New York.

The Mayer Furniture Co., a wholly-owned subsidiary of W. & J. Sloane, Inc. operates seven home furnishing stores under the trade name W. & J. Sloane. Its principal office and place of business is located at 1130 Connecticut Ave., Washington, D.C.

PAR. 2. Respondent City Stores Company is responsible for the formulation, control and direction of the policies and practices of the aforesaid divisions and subsidiaries including the acts and practices hereinafter set forth.

PAR. 3. Respondent City Stores Company sells and distributes merchandise in commerce by operating and controlling retail department, specialty and home furnishing stores in a number of states and by causing merchandise to be shipped from its warehouses and retail department stores for distribution to and purchase by the general public located in states other than those from which such shipments originate. By these and other practices respondent maintains, and at all times mentioned has maintained, a substantial course of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of its aforesaid business, respondent permits customers who qualify for credit to charge purchases to revolving credit accounts or other charge accounts. On

occasion, a customer's charge account balance consists of a credit on the customer's account which represents an amount of money owed to the customer by one of respondent's stores, rather than an amount of money owed to one of respondent's stores by the customer. This credit balance is the result of, among other things, overpayments by the customer or credits given for the purchase price of returned merchandise.

PAR. 5. Typical and illustrative of respondent's practices in handling the credit balances of its customers are the following: Respondent through its divisions and subsidiaries provides each customer having a charge account credit balance with a periodic statement setting forth the amount of the credit balance. A periodic statement is mailed at the end of the billing cycle during which the credit balance is created and at the end of the five billing cycles immediately following. No additional periodic statement is provided to a customer for any billing cycle during which the credit balance is reflected on the account, unless business is transacted on the account.

A number of respondent's divisions or subsidiaries do not inform charge account customers having a credit balance that they are entitled to request and receive a cash refund of their credit balance. At no time do any of respondent's divisions or subsidiaries refund cash representing outstanding credit balances without request.

Through such acts and practices respondent's divisions and subsidiaries in a substantial number of instances have retained in their possession substantial dollar amounts of credit balances belonging to their customers.

PAR. 6. By failing to notify all customers whose charge accounts reflect credit balances that they have the right to request and receive cash payment of the amounts of their credit balances, and by failing to refund without request credit balances reflected on accounts on which no business has been transacted for a substantial period of time, respondent has caused a substantial number of its divisions' and subsidiaries' charge account customers to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Five above were and are unfair.

PAR. 7. The acts and practices of respondent through its divisions and subsidiaries as set forth in Paragraphs Five and Six above, were and are to the prejudice and injury of the public and constitute unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of

certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent City Stores Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 500 Fifth Ave., New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent City Stores Company, a corporation, its successors and assigns and its representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on retail consumer revolving credit accounts or other retail consumer charge accounts (including, but not necessarily limited to thirty (30) day charge accounts) created incident to the business of selling consumer merchandise and services at retail, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to mail or deliver to each charge account customer

having a credit balance created after the date of entry of this order a periodic statement setting forth such credit balance, no fewer than three times in the six month period following the creation of the credit balance. *Provided, however,* that a periodic statement must be mailed or delivered as of the end of the first billing period during which the credit balance is created. *Provided further,* that no periodic statement need be sent once a credit balance is refunded or a fully offsetting purchase is made.

2. Failing to notify each charge account customer having a credit balance created later than sixty (60) days from the date of entry of this order of his right to request and receive a cash refund in the amount of such credit balance, such notice to be accomplished by a clear and conspicuous disclosure on or enclosed with each periodic statement required by Paragraph One and accompanied by a return envelope. Such disclosure shall in all material respects be consistent with but need not be identical to the following:

"NO PAYMENT REQUIRED

This Credit Balance represents money we owe you. You may use it or obtain a refund by presenting your statement at our store or by returning, in the enclosed envelope, the bill top of the enclosed statement indicating thereon 'please refund.' If you do not charge against this credit or request a refund, a check will be mailed to you automatically within 7 months after your credit balance was created. But a credit balance of $1 or less will not be refunded unless specifically requested, and it will not be credited against future purchases after the seven month period." *Provided, however,* if respondent refunds without request credit balances of one dollar ($1.00) or less, the last sentence of such disclosure may be deleted.

If the disclosure furnished in compliance with this paragraph is not identical to the above-quoted statement, such disclosure shall provide all of the information contained in the above quotation, shall not provide any additional information relating to credit balances, shall be set forth separately from any other written matter, and shall be made either entirely on the face of the periodic statement or entirely on one side of a separate page. In the event such disclosure is placed on the reverse side of the periodic statement or on a separate enclosure then the periodic statement shall state clearly and conspicuously on its face: "Credit balance. Do not pay. For refund see [enclosed instructions"] OR [reverse side"], *provided, however,* that this notice may be abbreviated.

3. Failing to refund to each charge account customer with a credit

balance of more than one dollar ($1.00) created after the date of entry of the order the full amount of said credit balance no later than thirty-one (31) days from the end of the sixth consecutive billing cycle during which a credit balance exists and the customer neither transacts any business on the account nor requests a refund, unless such credit balance is not in fact owed to the customer.

A. *It is further ordered,* That with respect to each credit balance owed to a customer in the amount of more than one dollar ($1.00) which was created at any time within the three-year period prior to the date of entry of this order and which has not been refunded to the customer as of the date of entry of this order, respondent shall refund to each such customer the full amount of such credit balance, unless such credit balance is not owed to the customer, or the customer makes a fully offsetting purchase within the period for compliance herewith; *provided, however,* that nothing contained herein shall prevent respondent from making such refund by giving a credit certificate(s), in the full amount of the credit balance which shall be redeemable, at the customer's option, in merchandise or cash. Such a certificate(s) shall clearly and conspicuously disclose on its face that it is redeemable for cash if the customer so requests in person or if the customer returns the certificate(s) by mail with a request for cash redemption. Respondent shall effect complete compliance with the provisions of this paragraph no later than seven (7) months after the date of entry of this order. The report required by Paragraph H of this order shall address itself specifically to the steps taken to comply with this paragraph.

B. *It is further ordered,* That each refund shall be given to the customer either in person or by mailing a check (or credit certificate(s) in the case of credit balances existing prior to the date of entry of this order) payable to the order of the customer to the last known address shown in respondent's records for said customer. Each periodic statement sent pursuant to the terms of this order shall be mailed to the customer at the last known address shown on respondent's records. In the event that any such statement or check (or credit certificate) is returned to respondent with a notification to the effect that the customer to whom it was mailed is not located at the address to which it was sent, respondent shall remail the check or statement (or credit certificate) with an address correction request to the Post Office unless respondent has already done so. If the check or statement (or credit certificate) which has been remailed is returned to respondent and reflects an amount larger than fifteen dollars ($15.00), respondent shall obtain from a credit bureau the most current address available for the customer in the credit bureau's files

by means of an in-file report or other credit bureau report. If a new address is obtained, respondent shall remail the check or statement to the customer. If the customer is not located by the preceding method, respondent shall reinstate the full amount of the credit balance on the customer's account to be retained for one year from the date on which the remailed check or statement was returned so that offsetting purchases can be made, and upon such reinstatement, respondent shall be relieved of any further obligation to send any additional notices and/or any refund without request with respect to the credit balance in question. In the event said customer should subsequently request a refund of any such credit balance, respondent shall treat such request in the manner provided in Paragraph C.

C. *It is further ordered,* That if a customer requests, in person or by mail, a refund of a credit balance in any amount at any time within six years subsequent to the date on which the credit balance was created, respondent shall, within thirty (30) days from receipt of such request, either refund the entire amount requested, if owed, or furnish the customer with a written explanation, with supporting documentation, when available, of the reason(s) for refusing to refund the amount requested. The returning of a bill top upon which the customer has indicated a request for refund, to respondent, shall constitute a request for a refund of the credit balance.

D. *It is further ordered,* That a credit balance shall be deemed to be created at the end of the billing cycle in which the credit balance is first recorded on a customer's account and at the end of the billing cycle in which the recorded amount of an existing credit balance is changed due to a customer's use of the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such change shall automatically be terminated and replaced by its obligations under this order with respect to the new credit balance created by said change.

E. *It is further ordered,* That, notwithstanding the foregoing, the provisions of this order shall not be applicable to credit balances on accounts administered by third parties.

F. *It is further ordered,* That respondent shall maintain for each of its retail operating divisions and subsidiaries the following data: name and address of each customer who was sent a refund without request of a credit balance; the date the credit balance was created and the date it was refunded; and the amount of the credit balance. *Provided, however,* that respondent shall not be required to maintain such data with respect to a customer who was sent a refund without request in excess of six (6) years from the date such refund was made.

G. *It is further ordered,* That respondent shall, upon request, produce for the purpose of examination and copying by representatives of the Federal Trade Commission those records required to be retained by this order.

H. *It is further ordered,* That respondent shall, within ninety (90) days after the entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

I. *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

J. *It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its retail operating divisions and subsidiaries.

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IN THE MATTER OF

ATLANTIC RICHFIELD COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2882. Complaint, Apr. 27, 1977 — Decision, Apr. 27, 1977

Consent order requiring a Los Angeles, Calif., manufacturer and marketer of petroleum products to cease failing to furnish credit card customers with periodic statements setting forth credit balances; failing to notify customers of their right to request and receive cash refunds of such credit balances; failing to provide prescribed disclosure statements with credit balance notifications; and failing to make proper refunds as detailed in the order.

Appearances

For the Commission: *Hong S. Dea.*

For the respondent: *David L. Roll, Steptoe & Johnson,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Atlantic Richfield Company, a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Atlantic Richfield Company is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with a principal office and place of business located at 515 South Flower St., Los Angeles, California.

PAR. 2. Respondent Atlantic Richfield Company manufactures and markets various petroleum products throughout the United States. It markets gasoline domestically for resale in approximately 37 states and the District of Columbia.

PAR. 3. Respondent sells and distributes petroleum products in commerce in a number of states by causing its products to be shipped from its refineries and from the places of business of its various suppliers to respondent's storage areas and retail gasoline service stations for distribution to and purchase by the general public located in states other than those from which such shipments originate. By these and other acts and practices, respondent maintains, and at all

times mentioned herein has maintained, a substantial course of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of its aforesaid business, customers of respondent who qualify for credit may charge purchases to gasoline credit card accounts at certain retail gasoline service stations. On occasion a customer's charge account balance consists of a credit on the customer's account which represents an amount of money owed to the customer by respondent, rather than an amount of money owed to respondent by the customer. This credit balance is the result of, among other things, over-payments by the customer or credits given for the purchase price of returned merchandise.

PAR. 5. Typical and illustrative of respondent's practices in handling the credit balances of its customers prior to 1976, were the following:

Respondent provided to each customer having a charge account credit balance of one dollar ($1.00) or more a periodic statement setting forth the amount of the credit balance. This periodic statement was usually mailed at the end of the billing cycle during which the credit balance was created and during the two billing cycles immediately following. No additional periodic statement was provided to a customer for any billing cycle during which the credit balance was reflected on the account, unless business was transacted on the account. At no time was a customer having a credit balance adequately and specifically informed by respondent that he was entitled to request and receive a cash refund of his credit balance.

Respondent provided to each customer having a credit balance of less than one dollar ($1.00) one periodic statement setting forth the amount of the credit balance, mailed at the end of the billing cycle during which the credit balance was created. No additional periodic statement was provided to a customer for any billing cycle during which the credit balance was reflected on the account, unless business was transacted on the account. At no time was a customer having a credit balance adequately and specifically informed by respondent that he was entitled to request and receive a cash refund of his credit balance.

If a customer having a credit balance of one dollar ($1.00) or more did not request a refund in cash of the amount of the credit balance or transact further business on his account, respondent maintained the credit balance on the account. If a customer having a credit balance of less than one dollar ($1.00) did not request a refund in cash of the amount of the credit balance or transact further business on his account within one month after receipt of the periodic statement,

respondent through bookkeeping entries, removed the credit balance from the customer's account. No cash payment to the customer was made at the time of the removal of his credit balance from his charge account.

Respondent did not refund cash representing an outstanding credit balance without a specific request by the customer.

PAR. 6. By failing to furnish to customers, during billing cycles in which credit balances of any amount remained outstanding, a sufficient number of periodic statements disclosing the amount of their credit balances; by failing to adequately and specifically notify customers whose charge accounts reflected credit balances that they had the right to request and receive cash payment of the amounts of their credit balances; and by failing to refund without request credit balances reflected on accounts on which no business had been transacted for a substantial period of time, respondent caused a substantial number of its charge account customers to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Five above were and are unfair.

PAR. 7. The acts and practices of respondent, as set forth in Paragraphs Five and Six above, were and are to the prejudice and injury of the public and constitute unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its

charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Atlantic Richfield Company is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 515 South Flower St., Los Angeles, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Atlantic Richfield Co., a corporation, its successors and assigns and its representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on gasoline credit card accounts or other retail consumer credit charge accounts (including, but not necessarily limited to thirty (30) day charge accounts) created incident to credit card sales of petroleum and automotive products at service station outlets, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to mail or deliver to each charge account customer having a credit balance created after the date of entry of this order a periodic statement setting forth such credit balance, no fewer than three times in the six-month period following the creation of the credit balance; *provided, however,* that a periodic statement must be mailed or delivered during the first billing period succeeding the creation of the credit balance.

2. Failing to notify each charge account customer having a credit balance created after the date of entry of this order of his right to request and receive a cash refund in the amount of such credit balance, such notice to be accomplished by a clear and conspicuous disclosure on or enclosed with each periodic statement required by Paragraph (1) and accompanied by a return envelope. Such disclosure shall in all material respects be consistent with but need not be identical to the following:

"NO PAYMENT REQUIRED

The Credit Balance shown on the enclosed statement represents money we owe you. You may use it or you may obtain a refund by returning the statement in the enclosed envelope. Please write across the statement 'refund requested.' If charges are not applied against this credit or you do not request a refund, a check will be mailed to you within seven months after your credit balance was created. But a credit balance of less than one dollar ($1.00) will not be refunded unless specifically requested, and it may not be credited against future purchases after the seven-month period."

If the disclosure furnished in compliance with this paragraph is not identical to the above-quoted statement, such disclosure shall provide all of the information contained in the above quotation, shall not provide any additional information relating to credit balances, shall be set forth separately from any other written matter, and shall be made entirely on the periodic statement or entirely on one side of a separate page. In the event such disclosure is not on the face of the periodic statement, then the periodic statement shall state clearly and conspicuously on its face: "Credit balance. Do not pay. For refund see [enclosed instructions"]OR [reverse side"] *provided, however,* that this notice may be abbreviated.

3. Writing off or deleting any credit balance of more than one dollar ($1.00) created after the date of entry of this order from a customer's account before respondent has made a cash refund or charges have been applied to the account, unless such credit balance is not in fact owed to the customer, or unless respondent has complied with the requirements of Paragraph B below.

4. Failing to refund to each charge account customer with a credit balance of more than one dollar ($1.00) created after the date of entry of the order the full amount of said credit balance no later than thirty-five (35) days from the end of the sixth consecutive billing cycle during which a credit balance exists and charges have not been applied against the account and the customer has not requested a refund, unless such credit balance is not in fact owed to the customer.

A. *It is further ordered,* That with respect to each credit balance owed to a customer in the amount of more than one dollar ($1.00) which was created at any time within the three year period prior to

the entry of this order, and which has not been refunded to the customer as of the date of entry of the order, respondent shall refund to each such customer the full amount of such credit balance, unless such credit balance is not owed to the customer, or the customer makes a fully offsetting purchase within the period for compliance herewith. Respondent shall effect complete compliance with the provisions of this paragraph no later than six (6) months after the date of entry of this order, and the report required by Paragraph J of this order shall address itself specifically to the steps taken to comply with this paragraph.

B. *It is further ordered,* That each refund shall be effected by mailing a check payable to the order of the customer to the last known address shown in respondent's records for said customer. Each periodic statement sent pursuant to the terms of this order shall be mailed to the customer at the last known address shown in respondent's records for said customer. If the check or statement is returned to respondent and reflects an amount larger than fifteen dollars ($15.00), respondent may remail such check or statement, and if such check or statement is returned following such mailing or following such mailing and remailing, respondent shall attempt to obtain from a credit bureau or other consumer reporting agency the most current address on file for that customer. If a new address is obtained, respondent shall remail the check or statement to the customer. If the customer is not located by the preceding method, respondent shall reinstate the full amount of the credit balance on the customer's account to be retained for one year from the date on which the check or statement was returned so that offsetting purchases can be made, and respondent shall be relieved of any further obligation to send any additional notice and/or any refund without request with respect to the credit balance in question; *provided, however,* that in the event said customer should subsequently request a refund of any such credit balance, respondent shall treat such request in the manner provided in Paragraph C.

C. *It is further ordered,* That if a customer requests by mail a refund of a credit balance in any amount which had been reflected at any time on such customer's account, respondent shall, within thirty (30) days from receipt of such request, either refund the entire amount requested, if owed and not escheated as required by state law, or furnish the customer with a written explanation, with supporting documentation, when available, of the reason(s) for refusing to refund the amount requested. The receipt by respondent of a mailed periodic statement [or other form referred to in Paragraph (2)] which

reflects a credit balance shall be deemed a request for a refund of said credit balance.

D. *It is further ordered,* That a credit balance shall be deemed to be created at the end of the billing cycle in which the credit balance is first recorded on a customer's account and at the end of the billing cycle in which the recorded amount of an existing credit balance is changed due to charges applied to the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such change shall automatically be replaced by its obligations under this order with respect to the new credit balance created by said change.

E. *It is further ordered* That, notwithstanding the foregoing, the provisions of this order shall not be applicable to credits created on delinquent customer accounts by the application of monies obtained by collection agencies in excess of the delinquent amount originally owed to respondent, where such excess represents attorney's fees, interest, court costs or other costs of debt collection.

F. *It is further ordered,* That respondent shall maintain the following data: name and address of each customer who received a refund without request of a credit balance; the date the credit balance was first reflected on the customer's account and the date of the first mailing of the refund; and the amount of the credit balance. *Provided, however,* that respondent shall not be required to maintain the information required by this paragraph for a period in excess of six years from the date each individual credit balance refund was first mailed.

G. *It is further ordered,* That respondent shall, upon request, produce for the purpose of examination and copying by representatives of the Federal Trade Commission those records required to be retained by this order.

H. *It is further ordered,* That this order shall not be deemed to have been violated if:

(1) respondent shows by a preponderance of evidence that its failure to comply with this order was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid such error; and

(2) within twenty (20) days from the time respondent discovers or should reasonably have discovered the error, respondent notifies the Commission in writing of the nature, extent, and apparent cause of the error and of the steps it has taken or it will take to rectify the error and prevent its recurrence; and

(3) within sixty (60) days from the time respondent discovers or

reasonably should have discovered the error, respondent takes all actions necessary to assure that all customers affected by the error promptly receive all the rights and benefits to which they are entitled pursuant to the terms of this order.

I. *It is further ordered,* That if respondent is of the opinion that changed conditions of fact or law require that this order be altered, modified or set aside, or that the public interest so requires, respondent has the right, pursuant to the Commission's Rules of Practice, to file with the Commission a petition requesting a reopening of the proceeding for that purpose.

J. *It is further ordered,* That respondent shall, within ninety (90) days after the entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

K. *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

L. *It is further ordered,* That respondent shall forthwith distribute a copy of this order to all management personnel whose duties involve the accounting and bookkeeping treatment of credit balances.

IN THE MATTER OF

GLOBE NEWSPAPER CO., INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2883. Complaint, Apr. 29, 1977 — Decision, Apr. 29, 1977

This consent order, among other things, requires a Dorchester, Mass., newspaper publisher to cease misrepresenting the role, identity, and purpose of telephone solicitors; failing to disclose the amount of charitable donations it will make in exchange for the purpose of newspaper subscriptions; and placing in the hands of others the means and instrumentalities by which the public may be deceived. Further, the firm is required to donate $70,000 to the St. Jude Research Hospital; maintain files containing inquiries and complaints relating to proscribed practices; and institute a surveillance program designed to insure solicitors' compliance with the terms of the order.

Appearances

For the Commission: *Lois M. Woocher, Arthur E. Levine,* and *Paul A. Manoff.*

For the respondent: *Bingham, Dana & Gould,* Boston, Mass.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commision Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Globe Newspaper Co., Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Globe Newspaper Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its principal office and place of business located at 135 William T. Morrissey Boulevard, Dorchester, Massachusetts.

PAR. 2. Respondent has been, and is now engaged in the publishing, advertising, offering for sale, and sale and distribution of the *Boston Globe* newspaper and other publications.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent has been and is now engaged in a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, in that respondent has caused said

publications to be shipped, mailed and distributed from its place of business to purchasers located in various States of the United States other than the state of origination. Respondent transmits and receives, and causes to be transmitted and received, invoices, checks, monies and other business papers or documents in the course of advertising, selling, or otherwise distributing and collecting payments for said publications among and between the several States of the United States.

PAR. 4. In the course and conduct of its business of offering to sell and selling the *Boston Globe* newspaper and other publications, as aforesaid, respondent has entered into business arrangements with certain telephone solicitation companies who, in turn, employ or hire "solicitors" or other representatives to sell said publications. Acting through these telephone solicitation companies, respondent, through various direct and indirect means and devices, places into operation and controls, directs, supervises, recommends and otherwise implements sales methods whereby members of the general public are contacted by telephone solicitors and, by means of statements, representations, acts and practices as hereinafter set forth, are induced to enter into oral agreements with respondent which provide for the purchase of the *Boston Globe* newspaper and other publications and for payment therefore.

Respondent has paid for rent, telephone, advertising costs and other business expenses of said telephone solicitation companies; assisted, aided, and cooperated in the preparation of the sales solicitation program employed by said companies; and maintained final authority over the contents of said sales program.

In this manner, respondent, directly or indirectly, controls, furnishes the means, instrumentalities, services, and facilities for, condones, approves and accepts the pecuniary benefits flowing from the acts, practices and policies hereinafter set forth, of said telephone solicitation companies.

PAR. 5. Respondent, in the course and conduct of its business as aforesaid, acting through its telephone solicitation companies' salespersons has made statements and representations, directly or indirectly, respecting the terms and conditions of its publication subscription offers designed and intended to induce the sales of said publications. Representative of such statements but not all inclusive thereof are the following.

A. Written statements prepared by respondent include:

> This is _____ calling on behalf of the Boston Globe for the Danny Thomas St. Jude's Leukemia Hospital for children. If you will take the Boston Globe for 90 days, the Boston Globe will make a donation to the St. Jude's Hospital.

> Almost everyone takes one or more newspapers and when they realize that contributions are the only means that many of these unfortunate children have to receive this expensive treatment FREE; they feel proud of their decision to have this paper delivered for 90 days.
>
> However, we are not asking for a direct donation, as the donation would be made by the Boston Globe and it's a grand and easy way to help * * * in the fight against Leukemia * * *.

B. Statements of salespersons of respondent's solicitation company acting under the control of the respondent have included:

> If you sign up for the Boston Globe for a trial period of just three months, the Globe has agreed to donate matching funds to St. Jude's Children's Hospital.
>
> I don't know exactly the amount of the donation given to St. Jude's Hospital but it's sizeable.
>
> If you subscribe to the Globe for 16 weeks then the entire subscription price will be donated to charity.

In the aforesaid manner, the respondent has represented, directly or by implication, that:

1. The telephone solicitors selling the *Boston Globe* newspaper and respondent's other publications are employed by or for the benefit of a charitable or non-profit organization.

2. Respondent donates all or a substantial amount of the total subscription price of the *Boston Globe* newspaper for the specified trial period to St. Jude's Hospital or other charitable or non-profit organization.

PAR. 6. In truth and in fact:

1. The telephone solicitors selling the *Boston Globe* newspaper and respondent's other publications are not employed by or for the benefit of a charitable or non-profit organization but are employed by a telephone solicitation company, Media Sales Inc., which has entered into a business arrangement with respondent to sell respondent's publications.

2. Respondent does not donate all or a substantial amount of the total subscription price of the *Boston Globe* newspaper for the specified trial period to St. Jude's Hospital or other charitable or non-profit organization. To the contrary, respondent donates a minimum amount of the subscription price to the charity. Thus, for a 13 week subscription to the *Boston Globe* newspaper costing $26, respondent pays $.25 to St. Jude's Hospital.

Therefore, the representations, acts and practices as set forth in Paragraph Five hereof, were, and are, unfair practices and are false, misleading and deceptive.

PAR. 7. In the further course and conduct of its business respondent, acting through the telephone solicitation companies, offers for sale and sells the *Boston Globe* newspaper and other publications without disclosing that the dollar amount of the donation given by respondent to St. Jude's Hospital is $.25. Such fact is material and, if known to potential customers, would be likely to affect their decision to purchase the *Boston Globe* newspaper or other publication. Therefore, failure to disclose such material fact is misleading and a deceptive and unfair act or practice.

PAR. 8. By and through the use of the aforesaid acts and practices, respondent places in the hands of telephone solicitation companies, their salespersons, and others the means and instrumentalities by and through which they may mislead and deceive the public in the manner and as to the things hereinabove alleged.

PAR. 9. The use by respondent, directly or indirectly, of the aforesaid false, misleading, deceptive and unfair representations, acts or practices has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of a substantial number of subscriptions to the *Boston Globe* newspaper and other publications of respondent.

PAR. 10. The aforesaid acts and practices of respondent, as herein alleged, have been to the prejudice and injury of the public and have constituted unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Globe Newspaper Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 135 Morrissey Boulevard, city of Boston, Commonwealth of Massachusetts.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Globe Newspaper Co., Inc., a corporation, and its successors, assigns, officers, agents, representatives and employees, directly or indirectly, through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any newspaper, newspaper subscription or other product in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any representative or other person soliciting a purchaser or prospective purchaser with the intent or with the result of inducing or securing a subscription, order for, or the purchase or agreement to purchase of the *Boston Globe* newspaper or other product is performing services on behalf or primarily for the benefit of or represents any charitable, educational, social, or other association, or any individual or firm other than respondent; or affirmatively misrepresenting in any manner, the identity of the solicitor or of his or her firm and the business they are engaged in.

2. Failing affirmatively to disclose clearly and conspicuously during the initial contact or solicitation of a purchaser or prospective purchaser, in connection with any offer to make a donation to or otherwise to benefit any charitable, educational, social, or other association or person other than a person whose sole benefit is in the form of a payment or receipt of monetary remuneration in the

normal course of the sale and delivery of newspapers, the terms, conditions, nature and exact amount expressed in dollars and as a percentage of the total cost to the purchaser or prospective purchaser of any such donation and benefit to said charitable, educational, social, or other association or person.

3. Furnishing or otherwise placing in the hands of others, the means and instrumentalities by and through which the public may be misled or deceived in the manner or by the acts and practices prohibited by this order, with the knowledge that said means and instrumentalities are likely to be used in an unfair or deceptive manner.

It is further ordered, That:

(A) Respondent pay the sum of seventy thousand dollars ($70,000) as a donation to the St. Jude's Children's Research Hospital located at 332 North Lauderdale St., Memphis, Tennessee 38101, a charitable organization. This sum shall be paid in two annual installments of thirty-five thousand dollars ($35,000) each. The first of such payments shall be made no later than sixty (60) days after the date of service of this order; and the second payment shall be made within one year following the date of the first payment;

(B) Respondent shall within thirty (30) days after each payment referred to above file with the Boston Regional Office a report in writing setting forth the manner in which compliance with subparagraph (A) of this paragraph was made and the records and documents demonstrating such compliance;

(C) Respondent herein deliver a copy of this decision and order to any person including present and future employees, agents, solicitors and independent contractors who in connection with any offer of a donation or benefit covered by Paragraph 2 of this order promotes, offers for sale or sells subscriptions to any product included within the scope of this order;

(D) Respondent herein provide each person or entity so described in subparagraph (C) of this paragraph with a form returnable to the respondent clearly stating his or her intention to be bound by and to conform his or her business practices to the requirements of this order; retain said statement during the period said person or entity is so engaged; and make said statement available to the Commission's staff for inspection and copying upon request;

(E) Respondent herein inform each person or entity described in subparagraph (C) of this paragraph that the respondent will not use or engage or will terminate the use or engagement of any such party, unless such party agrees to and does file notice with the respondent that he or she will be bound by the provisions contained in this order;

(F) If such party as described in subparagraph (C) of this paragraph will not agree to file the notice set forth in subparagraph (D) above with the respondent and be bound by the provisions of this order, the respondent shall not use or engage or continue the use or engagement of such party to promote, offer for sale, sell or distribute any product included within the scope of this order;

(G) Respondent herein inform the persons or entities described in subparagraph (C) above that the respondent is obligated by this order to discontinue dealing with or to terminate the use or engagement of persons who continue on their own the deceptive acts or practices prohibited by this order;

(H) Respondent herein institute a program of continuing surveillance adequate to reveal whether the business practices of each person described in subparagraph (C) above conform to the requirements of this order;

(I) Respondent herein discontinue dealing with or terminate the use or engagement of any person described in subparagraph (C) above, who continues on his or her own any act or practice prohibited by this order as revealed by the aforesaid program of surveillance; and

(J) Respondent herein maintain files containing all inquiries or complaints from any source relating to acts or practices prohibited by this order, for a period of two years after their receipt, and that such files be made available for examination by a duly authorized agent of the Federal Trade Commission during the regular hours of the respondent's business for inspection and copying.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

PROVIDENCE WASHINGTON INSURANCE COMPANY, ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATIONS OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket 9063. Complaint, Nov. 24, 1975—Final Order, May 3, 1977

This order, among other things, requires a Providence, R.I., insurance company and its subsidiary, Providence Premium Service, Inc., to cease misrepresenting to delinquent debtors that legal action is imminent or that delinquent accounts have been referred to third parties for collection. Further, the firm is required to cease violating the Truth in Lending Act by failing, in connection with the extension of consumer credit, to use proper terminology and to provide such disclosures as are required by Federal Reserve Board regulations. Additionally, the order dismisses the complaint issued against Christopher F. Kempf in his individual capacity and as a named officer of the two firms.

Appearances

For the Commission: *Harold F. Moody* and *William P. McDonough.*

For the respondents: *John J. Curtin, Jr.* and *Daniel L. Goldberg, Bingham, Dana & Gould,* Boston, Mass. and *William P. Thornton,* in-house counsel for Christopher F. Kempf.

COMPLAINT

[1] Pursuant to the provisions of the Truth in Lending Act, and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Providence Washington Insurance Company, a corporation, Providence Premium Service, Inc., a corporation, and Christopher F. Kempf, individually and as an officer of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

[2] PARAGRAPH 1. Respondent Providence Washington Insurance Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 20 Washington Place, Providence, Rhode Island.

Respondent Providence Premium Service, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 20 Washington Place, Providence, Rhode Island. Respondent Providence Premium Service, Inc. is a wholly-owned subsidiary of Providence Washington Insurance Company.

Respondent Christopher F. Kempf is an officer of the corporate respondents. He formulates, directs and controls the policies, acts and practices of the corporations, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondents.

The respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the business of lending money to the public in connection with the financing of insurance premiums.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the course and conduct of their business as aforesaid, respondents are now, and for some time last past have been, engaged in oral and written communications with debtors located in various States of the United States and at all times mentioned herein have maintained a substantial course of trade through the collection of delinquent accounts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

[2] PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the payment of alleged delinquent accounts, the respondents mail or cause to be mailed to alleged delinquent debtors various form letters and other printed material.

Typical and illustrative, but not all inclusive, of said form letters and other printed material are the following:

(1)

James F. Travers
Attorney At Law
20 Washington Place
Providence, RI 02901

Tel: (401) 331-6612

Dear ————:

I represent M.V. Service, Inc. in its claim against you for ———— due on the account listed below. Please contact this office and arrange to settle this account without delay. If I fail to hear from you, appropriate legal action will be taken.

Very truly yours,

James F. Travers

Acct. No. ————

[4] (2)

James F. Travers
Attorney At Law
20 Washington Place
Providence, RI 02901

Tel: (401) 331-6612

Dear ————:

This is your final notice. I wrote to you on ———— making claim against you for ———— due M.V. Service, Inc. I have received no reply. If I fail to hear from you within 15 days of the date of this letter, legal action will be started against you without further notice.

Very truly yours,

James F. Travers

PAR. 5. By and through the use of the letters described in subparagraphs One and Two of Paragraph Four, and others of similar import and meaning but not expressly set out herein, the respondents have represented, and are now representing, directly or by implication, to those to whom said letters are mailed that:

1. Respondents have referred delinquent accounts to an independent third-party attorney for institution of legal action.

2. Failure to remit payment or arrange to settle delinquent accounts immediately or within a stated period of time will result in the institution of legal action.

[5] PAR. 6. In truth and in fact:

1. Respondents have not referred delinquent accounts to independent third-party attorneys for institution of legal action. On the contrary, respondents' employees prepare and transmit the collection letters to such delinquent accounts.

2. Failure to remit payments or arrange to settle delinquent accounts immediately or within a stated period of time will not result

in the institution of legal action. On the contrary, respondents have never instituted legal action to collect delinquent accounts.

Therefore, the statements, representations, acts and practices set forth in Paragraphs Four and Five were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and are now, in substantial competition in or affecting commerce, with corporations, firms, and individuals engaged in providing services of the same general kind and nature as those provided by the respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that such statements and representations were and are true and into the payment of substantial sums of money to the respondents by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce, and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

[6] COUNT II

Alleging violations of the Truth in Lending Act and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 10. In the ordinary course and conduct of their business as aforesaid, respondents regularly offer to extend and for some time last past have regularly extended consumer credit as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 11. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, have caused, and are causing, their customers to enter into contracts for the purchase of insurance, by executing a binding Premium Finance Agreement, hereinafter referred to as the "agreement." Respondents provide

these customers with no consumer credit cost disclosures other than on the statement.

By and through the use of the agreement respondents:

(1) Failed in some instances to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

(2) Failed in some instances to disclose the annual percentage rate accurately to the nearest quarter of one percent, computed in accordance with the provisions of Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

(3) Failed to use the term "cash price" as defined in Section 226.2(i) of Regulation Z, to describe the purchase price of the transaction, as required by Section 226.8(c)(1) of Regulation Z.

[7] (4) Failed to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

(5) Failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

(6) Failed to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

(7) Failed to use the term "finance charge" to describe the sum of all charges, as required by Section 226.4 of Regulation Z to be included therein, as required by Section 226.8(c)(8)(i) of Regulation Z.

(8) Failed to use the term "total of payments" to describe the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

(9) Failed to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

(10) Failed to make all disclosures required by Regulation Z clearly, conspicuously, and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

PAR. 12. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

Initial Decision by Alvin L. Berman, Administrative Law Judge

September 2, 1976

Preliminary Statement

[1] The Federal Trade Commission issued its complaint in this proceeding on November 24, 1975,[1] charging respondents Providence Washington Insurance Company (hereinafter sometimes [2] referred to as "PW"), Providence Premium Service, Inc. (sometimes hereinafter referred to as "PPSI") and Christopher F. Kempf, individually and as an officer of said corporations, with having violated the Truth in Lending Act (15 U.S.C. 1601, *et seq.*), the implementing regulation promulgated thereunder (Regulation Z, 12 C.F.R. 226), and the Federal Trade Commission Act.

More specifically, Count I of the complaint charges that respondents, in violation of Section 5 of the Federal Trade Commission Act, misrepresented to alleged delinquent debtors that respondents had referred their delinquent accounts to an independent third-party attorney for institution of legal action and that failure to remit payment or to arrange to settle the accounts immediately or within a stated period of time would result in the institution of legal action.

PPSI admitted having made the specific written communications to debtors alleged in the complaint, but denied that it had thereby made the misrepresentations as alleged. PW and Kempf essentially denied responsibility for the alleged activities of PPSI.

Count II of the complaint alleges violations of the Truth in Lending Act, Regulation Z—the implementing regulation promulgated thereunder by the Board of Governors of the Federal Reserve System, and the Federal Trade Commission Act. These violations are alleged in connection with the making of "credit sales" as that term is defined in Regulation Z. The documents involved are so-called Premium Finance Agreements pursuant to which consumer credit was extended for the purpose of paying insurance premiums to insurance companies. It is alleged that these agreements were the sole source of consumer credit cost disclosure to customers and that certain specified disclosures allegedly required by various portions of Sections 226.8(b) and (c) of Regulation Z had not been made. It is also alleged that respondents failed to make all disclosures required by Regulation Z clearly, conspicuously and in a meaningful sequence, as is required by Section 226.6(a) of Regulation Z.

PPSI, which is not an insurance company, admitted generally that,

[1] Complaint was mailed on December 23, 1975.

prior to October 1, 1974, it entered into premium finance agreements with customers, which agreements contained the only consumer cost disclosures provided to said customers and that certain agreements and forms of agreements used by PPSI employees between July 1, 1969 and October 1, 1974, were [3] deficient under Regulation Z. PPSI further admitted the specific deficiencies alleged in the complaint, but did not admit that it thereby violated Regulation Z.[2] It denied having violated Regulation Z in any further particulars.

Again, as under Count I, PW and Kempf essentially denied responsibility for the alleged activities of PPSI.

As an affirmative defense, the respondents asserted that both Counts I and II of the complaint are precluded by reason of the McCarran-Ferguson Act, 15 U.S.C. 1011, *et seq.* Other affirmative defenses raised by PPSI are (1) that it voluntarily discontinued the conduct complained of in Count I prior to institution of this proceeding, does not engage in such conduct and there is no likelihood of its ever doing so in the future; (2) that it terminated its activities in the premium finance business (the subject matter of Count II) on October 1, 1974, other than for the collection of outstanding debts; that said termination arose from business and economic considerations and there is no likelihood of PPSI reentering the field; and (3) that a number of the alleged violations occurred due to inadvertent use by PPSI representatives of forms which had been superseded and that any errors or omissions resulted from human error.

Additional affirmative defenses raised by PW are that PW did not control, supervise, initiate, authorize or participate in the complained of activities of PPSI nor did it direct the day-to-day operation of PPSI; that PW is engaged [4] in the business of insurance—not the business of financing insurance premiums, and has no intention of engaging in the business of financing insurance premiums either directly or through subsidiaries.[3]

Kempf affirmatively pleaded that he did not directly perform or authorize any of the allegedly unlawful acts; that he is not the alter

[2] In particular, PPSI affirmatively alleged that failures to accurately disclose the annual percentage rate as required by Section 226.8(b)2 of Regulation Z were overstatements, not for the purpose of circumvention or evasion of disclosure requirements and, hence, pursuant to Section 226.6(h) of Regulation Z, were not violations of the regulation.

PPSI also denied that the failure to use the term "unpaid balance of cash price," as allegedly required by Section 226.8(c)(3) of Regulation Z, violated the regulation.

[3] An exception was recited with respect to a situation in Texas, where PW indirectly, through a subsidiary and an affiliate, sells insurance on credit.

ego of either PW or PPSI; and that he does not control either corporation.[4]

In addition to the complaint and answers thereto, pertinent submittals of the parties include the following: complaint counsel's Requests for Admissions addressed to respondents, dated February 25, 1976, and respondents' responses thereto, dated March 31, 1976; Stipulation of Facts, Set No. 1, filed April 13, 1976; Respondents' Motion for Summary Decision, filed April 26, 1976, including memorandum in support thereof and affidavits of Fred L. Jaquith and William P. Thornton, Jr., dated April 23, 1976, attached thereto; complaint counsel's Motion for Summary Decision, filed April 26, 1976, and memorandum in support thereof; the respective oppositions of the parties to the motions of opposing parties for summary decision and the replies to such oppositions; affidavit of Margaret J. Gilhooly, dated May 11, 1976; and the trial briefs of the parties.[5]

[5] Hearings were held on June 21 and June 22, 1976, at the conclusion of which the record was closed. Proposed findings and briefs were filed by the parties on August 2, 1976. Replies were filed on August 9, 1976. This initial decision is based on the record as a whole. Proposed findings of fact and conclusions of law submitted by the parties have been given careful consideration and to the extent they have not been included herein either in the language proposed or in substance, they are rejected as not supported by the evidence or as immaterial or irrelevant.[6]

Throughout this decision, there are findings which are numbered for convenience of reference. Numbered findings may be found as follows:

Findings 1—8	pages 16—22
" 9—15	" 28—30
" 16—32	" 30—35
" 33—37	" 37—44
" 38—50	" 44—49
" 51—58	" 50—51
" 59—63	" 52—54

[4] The above recitation of affirmative defenses is not to be taken as a determination that respondents have the burden of proof, or even the burden of going forward, with respect to all such matters. It simply constitutes a recitation of those matters pleaded by respondents in the form of affirmative defenses.

[5] As a matter of convenience, the Jaquith affidavit was received in evidence as Respondent Exhibit (RX) 10; the Thornton exhibit was received in evidence as RX 11; the Gilhooly affidavit was received as RX 12; and the Stipulation was received as RX 13.

In admitting the several affidavits into evidence, the undersigned advised the parties that their use would be limited to the extent that they were not controverted by opposing counsel. Transcript of Proceedings, p. 190 (Tr. 190).

[6] Abbreviations used in this decision include:

Tr.—Transcript of proceedings.

CX—Commission exhibit.

RX—Respondent exhibit.

Other findings and conclusions included or encompassed in other portions of this decision, though not numbered, are nevertheless findings of the undersigned.

As recited above, both complaint counsel and respondents filed motions for summary decision on April 26, 1976. Respondents' motion was grounded on their affirmative defense that both counts of the complaint are barred as to all respondents by reason of the McCarran-Ferguson Act, 15 U.S.C. 1011, *et seq.* Complaint counsel, on the other hand, moved for summary decision on the merits as to the two corporate respondents in reliance upon the pleadings, admissions and stipulations. On May 27, 1976, the undersigned denied respondents' motion for summary decision and granted in part and denied in part the motion of complaint counsel.

[6] This initial decision is based in large part upon the findings, reasonings, and conclusions enunciated in the undersigned's order of May 27, 1976, ruling upon the motions for summary decision. Rather than refer to the contents of that order, it is deemed preferable to incorporate pertinent portions into this initial decision and physically make them a portion hereof. This will allow for a continuity of reading in one decision without the necessity of consulting a different document. At the same time, additional findings, discussions and conclusions are made on the basis of the hearings and further contentions and presentations of the parties, or as otherwise appropriate.

MCCARRAN–FERGUSON ACT DEFENSE

Since there would be no need to consider the details of the challenged acts and practices if the entire action were held barred by reason of the McCarran-Ferguson Act, that issue will be considered first. Here follows that portion of the undersigned's order dealing with respondent's motion for summary decision by reason of the McCarran-Ferguson Act.[7]

It is uncontested that respondent Providence Washington Insurance Company (PW) is in the business of insurance and that respondent Providence Premium Service, Inc. (PPSI), an indirectly wholly-owned subsidiary of PW, is (or was until October 1974) in the business of financing insurance premiums.

The McCarran-Ferguson Act was passed in reaction to the decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). Prior thereto, it had been assumed that issuance of a policy of insurance was not a transaction in commerce and that regulation of

[7] In reproducing the portions of the order of May 27, 1976, footnote numbers have been changed to run consecutively with others in this initial decision. Findings have similarly been renumbered.

insurance transactions rested exclusively with the states. *Paul* v. *Virginia,* 8 Wall. 168, [7] 183 (1869). In *South-Eastern Underwriters,* it was held that insurance transactions were subject to federal regulation under the commerce clause, and that the antitrust laws, in particular, were applicable. Congress reacted by passing the McCarran-Ferguson Act. As stated in *Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408, 429 (1946), the Congressional "purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance."[8]

The McCarran-Ferguson Act, in pertinent part, provides as follows:

> §1011. Congress declares that the continued regulation and taxation by the several States of the *business of insurance* is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of *such business* by the several States.
>
> §1012.
>
> (a) The *business of insurance,* and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of *such business.*
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the *business of insurance,* or which imposes a fee or tax upon *such business,* unless such Act specifically relates to the *business of insurance: Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the *business of insurance* to the extent that *such business* is not regulated by State law. (*emphasis added;* 15 U.S.C. 1011, 1012).

[8] It may be noted at the outset that the portion of the act crucial to disposition of respondents' motion is the phrase "business of insurance."

The Truth in Lending Act, 15 U.S.C. 1601, *et seq.,* does not specifically relate to the business of insurance. The McCarran-Ferguson Act exemption would apply, therefore, if (1) the activities at issue are part of the business of insurance and (2) if so, if those aspects of the business of insurance are regulated by state law. The leading case in shedding light upon the question of whether the activities at issue are part of the business of insurance—the case with which all others start in reaching their individual decisions with respect to the factual situations that are under scrutiny—is *SEC* v. *National Securities, Inc.,* 393 U.S. 453 (1969). In appraising what was intended by the concept, the "business of insurance," the Supreme Court stated (at pp. 459-460):

[8] See, *SEC* v. *National Securities, Inc.,* 393 U.S. 453, 458 (1969).

> * * *The statute did not purport to make the States supreme in regulating all the activities of insurance *companies;* its language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the *business* of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply* * *Congress was concerned with the type of state regulation that centers around the contract of insurance, the transaction which *Paul* v. *Virginia* held was not "commerce." The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the "business of insurance." (Emphasis in original.)

[9] Thus, we start with the basic concept that the "business of insurance" has to do with the contract of insurance, the relationship between the insurance company and its policyholder, and that other activities of insurance companies which relate to their status as reliable insurers must also be included.

As the Court stated in *SEC* v. *Republic National Life Insurance Co.*, 378 F. Supp. 430, 436 (S.D.N.Y. 1974), "*National Securities* indicates that the MFA [McCarran-Ferguson Act] is to be narrowly construed in the face of valid federal regulatory interests: accomodation of federal and state regulatory interests is to be sought." And see, *Hill* v. *National Auto Glass Co., Inc.*, 1971 Trade Cases, ¶73,594 at p. 90,459 (N.D.Cal. 1971).

In balancing the scope of the McCarran-Ferguson Act with the legitimate thrust of the Truth in Lending Act, the Commission, in *Peacock Buick, Inc.*, Dkt. 8976, Order Denying Petition For Reconsideration [87 F.T.C. 379], 3 CCH Trade Reg. Rep. ¶21,105, made the following observation:

> If the "business of insurance" intrudes upon the business of financing, we think it does so only at the point at which the borrower or his lender may seek to deal with *insurer* regarding particular details of the policy being purchased. To hold otherwise, we believe, would do little to effectuate the Congressional desire to leave regulation of the business of insurance to the states, but do much to thwart the clear federal interest in preventing deception* * *in credit financing generally. (Emphasis in original; at p. 20,965 [*supra*, at 382].)

Applying this analysis to the instant case, we are compelled to conclude that the credit transactions here involved do not pertain to the particular details of the policy being purchased. The policy is purchased from PW, or such other insurance company as may be involved. The credit, as extended by PPSI to the insured, does not purport to involve the insurer regarding any of the policy's details.

The policy is a self-contained document quite apart from the credit arrangement.

[10] PW is an insurance company engaged in the business of insurance. Whatever exemptions the McCarran-Ferguson Act might afford to application of the Federal Trade Commission and Truth in Lending Acts to transactions of PW in selling insurance on credit or in collecting money owed it for insurance premiums, they are inapplicable here. For whatever reasons it may have, PW has seen fit that a separate corporation, PPSI, conduct the business of financing insurance premiums for its customers, including the collection of outstanding debts owed to PPSI arising from such financing. Further, PPSI has financed insurance premiums due to other insurance companies and has acted to collect outstanding debts owed to PPSI arising from such other financing (Gilhooly Affidavit, dated May 11, 1976; RX 12).

PPSI is not an insurance company. It is in the business of extending consumer credit and, in the course of that business, it collects outstanding obligations to it. It is not engaged in the business of insurance simply because its loans are limited for the purpose of financing insurance premiums. It is no more in the business of insurance than a company which lends money for a number of purposes, including the financing of insurance premiums. When PPSI lends money to finance insurance, it pays the full premium due to the insurance company (PW or other). There is no debtor-creditor relationship between the insurance company and the policyholder, since all obligations exist between PPSI and its debtor. See Jaquith affidavit in support of respondents' motion for summary judgment (RX 10 A, B).

The situation is similar to that involved in *Boutell* v. *Walling,* 327 U.S. 463 (1946). That case involved a common carrier which owned a service company which furnished maintenance service to the carrier's trucks. The Supreme Court held that the service company's employees were not within the exemption for "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service" contained in Section 13(b)(1) of the Fair Labor Standards Act prior to 1966 (29 U.S.C. (1964 ed.) 213(b)(1)). The Court reasoned that the jurisdiction of the Interstate Commerce Commission was, in the main, limited to carriers and their employees and, on the basis of the corporate arrangement chosen by the parties, the service company was not a carrier although the work it performed was solely for the carrier. (See particularly 327 U.S. at 467–68.) PPSI is no more engaged in the

business of insurance than was the company which serviced the common carrier's trucks engaged as a common carrier.

[11] "One who has created a corporate arrangement, chosen as a means of carrying out his business purpose, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public." *Schenley Corp.* v. *United States,* 326 U.S. 432, 437 (1946). PPSI, which is not an insurance company and is not engaged in the business of insurance, having been set up to arrange for, process and collect loans for the purpose of financing insurance premiums, the McCarran-Ferguson exemptions do not apply to the activities of PPSI.[9] The case here is even stronger since PPSI's activities in the course of financing insurance premiums are not limited to insurance issued by PW.

PPSI cannot be said to be in the "business of insurance" merely because an insurance policy is tangentially involved. *Peacock Buick, Inc.,* Dkt. 8976, Order Denying Petition For Reconsideration, March 2, 1976 [*supra*], 3 CCH Trade Reg. Rep. ¶21,105. Though the borrower may appoint PPSI as his attorney to cancel the insurance in the event the insured fails to make a payment when due, and assigns to PPSI as security various benefits under the policy,[10] this does not make the lender-borrower relationship between PPSI and the insured a part of the contractual relationship between PW or other insurer and the insured. PPSI's relationship to the business of insurance is similar to that of one who lends money to the purchaser [12] of a house and secures a deed of trust as security in the event of default of mortgage payments. The mortgagee, simply because he can exercise rights with respect to the property in event of default on the debt, is not in the business of selling real property. Neither is PPSI in the business of insurance.

Respondents' reliance upon *Addrisi* v. *Equitable Life Assurance Society of United States,* 503 F.2d 725 (9th Cir. 1974), *cert. denied,* 420 U.S. 929 (1975), and *Dexter* v. *Equitable Life Assurance Society of the United States,* 1975-2 Trade Cases ¶60,601 (2nd Cir. 1957), for the proposition that lending activities of insurance companies to induce persons to secure insurance are exempt under the McCarran-Fergu-

[9] See also, *Commander Leasing Co.* v. *Transamerica Title Insurance Co.,* 477 F.2d 77, 86 (10th Cir. 1973), where the Court indicated that if the complaint had been amended to charge two defendants with acting solely as agents to abstract titles for other defendants who issued title insurance, rather than charging them with providing "title proof and assurance [insurance]," the McCarran-Ferguson Act exemption might not have applied to the two agents. Abstracting titles is an essential element of the business of issuing title insurance. Yet, doubt was expressed as to whether the activities of a third party in performing this service was itself the "business of insurance." Here, it is not essential to sell insurance on credit. To the extent a third party, PPSI, provides premium financing to those who want to purchase insurance, PPSI is in the business of extending credit—not in the business of insurance.

[10] The contract, however, is not limited to this alternative. Under the Premium Finance Agreement, PPSI, upon default of payment, may declare the entire balance due and payable. See Tab B to Jaquith affidavit (RX 10 M).

son Act as part of the business of insurance, is misplaced. In both cases, the activities were those of insurance companies whose insurance business activities (activities undertaken in the course of securing insurance business) were held regulated by the states involved. PPSI is not in the business of insurance. The same distinction applies to the decisions in *Ben* v. *General Motors Acceptance Corp.*, 374 F. Supp. 1199 (D. Colo. 1974)[11] and *Gerlach* v. *Allstate Ins. Co.*, 338 F. Supp. 642 (S.D. Fla. 1972), upon which respondents also rely.

Respondents would construe language of the Supreme Court in *SEC* v. *National Securities, Inc., supra,* which appears at 393 U.S. 459-60, to hold that the McCarran-Ferguson Act exemption extends to people who are neither the insurance company nor the insured. To the contrary, the language relied upon follows the statement, "The statute did not purport to make the States supreme in regulating all the activities of insurance *companies*" (emphasis in original). The discussion relied upon then goes on to limit the application of the McCarran-Ferguson Act to insurance companies so as to cover only the "business of insurance." See pp. 8-9, *supra,* for discussion of what insurance company activities are involved. Thus, the language relied upon by respondents did [13] not purport to expand the "business of insurance" concept beyond the activities of insurance companies, but limited that concept to recognize that not all activities of insurance companies constitute the "business of insurance."

The other cases relied upon by respondents as being in accord with their expanded concept of the "business of insurance" all involved *activities of insurance companies* which, while not part of the insurance company—insured contractual relationship, were closely related to or affected that relationship.[12]

Having found (1) that the acts and practices in question are not part of the "business of insurance," there is no need to consider (2) the extent to which the various states have regulated the business of insurance. In any event, the considerations under the second question, as pertinent here, would in part have paralleled those under which the first was answered. As stated in *American Family*

[11] Respondents point out that in *Ben* v. *General Motors Acceptance Corp.*, the McCarran-Ferguson Act exemption was applied to a premium finance company defendant. It is not clear that the problem was directly presented to that court, since it resolved the case upon an allegation that GMAC acted with its subsidiaries to sell insurance.

[12] These cases include *FTC* v. *National Casualty Co.*, 357 U.S. 560 (1958); *California League of Independent Ins. Producers* v. *Aetna Casualty and Surety Co.*, 175 F. Supp. 857 (N.D. Cal. 1959); *Travelers Insurance Co.* v. *Blue Cross of Western Pennsylvania*, 481 F.2d 80 (3d Cir. 1973); *Schwartz* v. *Commonwealth Land Title Insurance Co.*, 374 F. Supp. 302 (E.D. Pa. 1974); *Robertson* v. *People of California*, 328 U.S. 440 (1946); *Proctor* v. *State Farm Mutual Automobile Insurance Company*, C.A. No. 249-72 (D.D.C. Dec. 18, 1975); *Nankin Hospital* v. *Michigan Hospital Service*, 361 F. Supp. 1199 (E.D. Mich. 1973).

Life Assurance Co. of Columbus v. *Planned Marketing Associates, Inc.*, 389 F. Supp. 1141, 1146 (D.C. Va. 1974):

> Thus, the State anti-trust and restraint of trade regulation which would oust federal anti-trust and restraint of trade legislation must be State regulation of anti-trust and restraint of trade activities which directly or indirectly affect the relationship between the insurer and its insured.

In the instant case, the trade activities said by respondents to be regulated do not directly or indirectly affect the relationship between an insurance company and its insured. The relationship here involved is that between PPSI and its debtors in the granting and collection of loans and PPSI is not an insurance company. The relationships between PW, or other insurance companies, and their insured are not involved.

[14] In *California League of Independent Insurance Producers* v. *Aetna Casualty & Surety Co.*, 175 F. Supp. 857, 860 (N.D. Cal. 1959), the Court held:

> This Court is of the opinion that a State regulates the business of insurance within the meaning of §1012(b) when a State statute generally proscribes (F.T.C. v. National Cas. Co., 1958, 357 U.S. 560, 78 S. Ct. 1260, 2 L.Ed. 2d 1540) or permits or authorizes certain conduct on the part of the insurance companies.[13]

Any state proscription, permission or authorization of conduct on the part of insurance companies would not constitute exempting regulation under the McCarran-Ferguson Act [applicable to this case], since PPSI is not an insurance company.

For some period up to October 1974, PPSI was licensed by Illinois, Connecticut, Florida, Kentucky, Massachusetts, Virginia and Washington to engage in the business of insurance premium financing (Tab A to Jaquith affidavit; RX 10 D, F-K). PPSI, however, was not licensed as an insurance company, and the licenses noted above do not reflect state regulation affecting the relationship between an insurer and its insured. During the same period of time, PPSI was licensed by Colorado, Rhode Island, and Wyoming to make loans, not limited to the financing of insurance premiums, under statutory provisions covering the making of loans in general (Tab A to Jaquith affidavit; RX 10 C, E, L). Such laws of general application would not be deemed to have been enacted "for the purpose of regulating the

[13] See *Ohio AFL-CIO* v. *Insurance Rating Board*, 451 F.2d 1178, 1181 (6th Cir. 1971) and *Holly Springs Funeral Home* v. *United Funeral Service*, 303 F. Supp. 128, 135 (N.D. Miss. 1969), where this language was cited with approval.

business of insurance." See, *Hamilton Life Insurance Company of New York* v. *Republic National Life Insurance Company,* 408 F.2d 606, 611 (2d Cir. 1969); *SEC* v. *Republic National Life Insurance Co.,* 378 F. Supp. 430, 436 (S.D.N.Y. 1974).

[15] It was upon the foregoing considerations that respondents' motion for summary decision in reliance upon the application of the McCarran-Ferguson Act was denied.

During the course of the hearings, respondents called the undersigned's attention to *Cochran* v. *Paco, Inc.,* 400 F. Supp. 219 (N.D.Ga. 1976), where it was held that the Truth in Lending Act was inapplicable to an insurance premium finance agreement between a premium finance company and an insured because of the McCarran-Ferguson Act. This decision was not available in the advance sheets until after respondents filed their motion for summary decision and after the undersigned's order of May 27, 1976. During the hearings, respondents stressed facts of record and introduced additional evidence in an effort to demonstrate that the principles enunciated in *Cochran* v. *Paco, Inc.* applied to the instant case and that it should be decided in the same manner. In their brief, respondents have also relied upon *Lowe* v. *Aarco-American, Inc.,* No. 76-1226, 7th Cir., June 22, 1976, decided the very day hearings were closed in the instant case. This case also holds that the activities of a lender of money for insurance premiums are exempt from the provisions of the Truth in Lending Act by reason of the McCarran-Ferguson Act.

The undersigned has studied both recent cases relied upon by respondents and is respectfully of the opinion that they are incorrectly decided insofar as they extend McCarran-Ferguson Act exemption to the lending activities of premium finance companies. The undersigned, of course, is aware of the precedential effect of the two decision, particularly that of *Lowe* v. *Aarco-American, Inc.*[14] but, at this stage of the development of the law on this issue, feels compelled to decide the matter as he perceives it should be resolved. At the same time, it is deemed suitable that pertinent findings be made for appropriate use in the event a reviewing authority should disagree with the undersigned's views on the application of the McCarran-Ferguson Act exemption on the basis of *Lowe* v. *Aarco-American, Inc., Cochran* v. *Paco, Inc.,* or otherwise. [16]

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[14] Complaint counsel have advised in their brief that *Cochran* v. *Paco, Inc.* is on appeal to the United States Court of Appeals for the Fifth Circuit.

ADDITIONAL FINDINGS FOR MCCARRAN-FERGUSON ACT CONSIDERATION[15]

1. PW, through Western Alliance Insurance Company (a wholly-owned subsidiary of PW) and Providence Lloyds (an affiliated unincorporated organization under Texas law), both insurance companies, accepts promissory notes in payment for insurance premiums and collects on such notes. This is done only in Texas, where state law permits and encourages such a practice (PW Answer 2.2; RX 13B; Thornton, Tr. 155). While other states do not prohibit the sale of insurance on credit, they treat such sales as "non-admitted." They would discount or disallow such transactions when evaluating the financial responsibility of PW. Such an evaluation would reduce the company's credited surplus. This would reduce the amount of premiums the company could write, which in turn would result in reduced profits. Consequently, when an insured in any state other than Texas requires credit, it is PW's practice to arrange for financing through a premium finance company—not to extend credit itself. In that way, PW gets full credit for a cash transaction; its ability to write additional insurance is not impaired; and the insured is able to secure financing of the premium (Thornton, Tr. 155-58).

2a. In engaging in the business of insurance premium financing, PPSI's only business, PPSI followed what is the general industry practice, although variations occurred in individual cases. The agent or broker representing the insurance company would offer the insured the opportunity to finance his insurance premiums. If the insured opted to finance with PPSI, the insurance agent would fill in the blanks on a PPSI form of premium finance agreement which the insured would sign. The insured would at that time give the agent his downpayment. While several different forms were used, all appointed PPSI as the insured's attorney-in-fact to cancel his insurance policy in the event of nonpayment of installments. The completed insurance premium finance agreement would be sent by the agent to PPSI for acceptance. [17] Upon receipt and acceptance, PPSI would normally forward the entire premium balance due to the agent who, after taking his commission, would forward the balance of the total amount of the policy to the insurance company. (In some instances, the proceeds of the premium finance transaction would be sent directly to the insurance company.)

2b. Thereafter, the insured is to pay the debt installments directly to PPSI. If those payments are not made when due, PPSI

[15] Findings made under any heading are not limited for use under that heading but are applicable to the entire decision.

sends the insured a notice that, unless he pays, PPSI will act to cancel his insurance. If payment is not received within a specified period of time, PPSI, acting as the insured's attorney-in-fact, effectuates the cancellation of the insurance by sending a cancellation notice to the insurance company, with a copy to the insured. Upon cancallation, the insurance company computes the amount of unearned premium, net of the agent's commission, and credits that sum to the agent. The agent adds to that sum the amount of any unearned commission and sends the total unearned premium to PPSI. If this sum exceeds the balance due to PPSI from the insured, the amount of any such overage is sent to the insured. If the unearned premium returned to PPSI is less than the amount due from the insured, PPSI may attempt to collect the shortfall from the insured. This general description of insurance premium financing is generally the same on so-called "direct-bill sales," except that in those instances no agent is involved (Thornton, Tr. 158-60; RX 2).

3. Following is an excerpt from a PPSI premium finance agreement which contains the exact terms of the provision whereby PPSI is given the authority to act as attorney-in-fact for the insured and the conditions under which PPSI may effect cancellation of the policy:

> In consideration of the payment by Providence Premium Service Inc. (hereinafter referred to as PPS) to the insurance company(ies) or the producer named above to be made by PPS in the amount of the AMOUNT FINANCED, the undersigned insured promises to pay to the order of PPS at the address shown above the TOTAL OF PAYMENTS according to the schedule shown, and the insured also:
>
> 1. Assigns to PPS as security for this obligation all unearned and return premiums, dividends and loss payments payable from time to time to the [18] insured under the policies listed above, and directs the insurance company to pay all such sums directly to PPS; and any such funds received by PPS shall be applied to the balance due hereunder including interest and late charges, and PPS shall pay any excess to the insured and the insured shall remain liable for any deficiency.
>
> 2. Irrevocably appoints PPS as his attorney-in-fact to receive all sums described in paragraph 1 and, upon default by the insured, to cancel any or all policies listed above, and, in furtherance of the powers given herein, to execute and deliver all documents and negotiate all instruments for the payment of money all on behalf of the insured.
>
> 3. Agrees that upon default, PPS may declare the entire unpaid balance due and payable immediately and that "default" as used herein means the failure to make any payment when due and the cancellation, termination or assignment of any or all of the insurance policies whether caused by the insured or not.
>
> (RX 2)

4. While the insurance company regards the premium as having been paid in full, as a matter of insurance accounting, the entire

premium is not treated as income when received. It is taken into income as earned. The remainder is placed into an account called the Unearned Premium Reserve. If a loan is properly calculated, there should be an unearned premium over and above the amount of loan due when the policy is cancelled. The unearned premium is calculated in either of two ways. When the insurance company cancels, a pro rata method is used which is simply the number of days over 365 times the premium. When the insured cancels, a short rate table is used, which provides the insurance company greater amounts to compensate for the expenses of putting the business on the books. When the premium finance company cancels a policy, it is acting for the insured so that the short rate formula, which is less favorable to the insured, is used (Thornton, Tr. 158-165).

5. Of course, the very act of cancellation affects the insurance company-insured relationship. Further, if reinstatement is requested after such cancellation, the insurance company has the opportunity to refuse to reinstate for some [19] reason totally unrelated to financing. It gives the insurance company an opportunity to get out of an undesirable contract. In instances where there is a disagreement between the finance company and the insured as to whether payment has been made, the finance company may cancel the policy for failure to make payment while the argument is going on. Sometimes, where there is a lienholder, the insurance company may be required to give 30 days notice of cancellation to the lienholder but only the usual 10 to the insured. This may give rise to a situation where the insured may be liable to pay for a loss incurred during the 30-day period although he may not be insured at the time (Thornton, Tr. 166, 197-199, 224).

6. Section 4.304 of the Uniform Consumer Credit Code-Insurance, which (according to Section 4.102(2)) is the only provision applicable to loans the primary purpose of which is the financing of insurance, reads as follows:

Cancellation by Creditor

> Sec. 4.304. A creditor shall not request cancellation of a policy of property or liability insurance except after the debtor's default or in accordance with a written authorization by the debtor, and in either case the cancellation does not take effect until written notice is delivered to the debtor or mailed to him at his address as stated by him. The notice shall state that the policy may be cancelled on a date not less than 10 days after the notice is delivered, or, if the notice is mailed, not less than 13 days after it is mailed.

7. As previously found, PPSI was licensed to engage in the business of insurance premium financing in Illinois, Connecticut,

Florida, Kentucky, Massachusetts, Virginia, and Washington, and was generally licensed to make loans in Colorado, Rhode Island, and Wyoming (see p. 14, *supra*).

a. The Connecticut Code covering the activities of insurance premium finance companies is specifically inapplicable to insurance companies and state and national banking institutions (Sec. 38-290). The contents and disclosures to be made in insurance premium finance agreements are specified (Sec. 38-297); and various notice and distribution of assets provisions are specified [20] in the event the premium finance company cancels the insurance policy on behalf of the insured.

b. The portion of the Florida Insurance Code covering premium finance companies similarly exempts banking type institutions (Sec. 627.826(2)). It does require particular disclosures to be made in the agreement and that the agreement form be filed and approved by the state insurance department prior to use (Secs. 627.838 and 627.839); and has provisions similar to those in the Connecticut statute covering the event of cancellation of the policy by the premium finance company under a power of attorney or other authority to do so.

c. The Illinois Code covering premium finance companies also exempts banks, insurance companies and similar financial institutions from its provisions (Sec. 513), except that even such institutions are covered by Section 521, which contains provisions similar to those of Connecticut and Florida to be effective in the event of cancellation of the policy by the creditor under a power of attorney. Section 519, which is not applicable to insurance companies, banks and financial institutions does specify the form and contents of a premium finance agreement.

d. The Kentucky Code covering insurance premium financing is inapplicable to insurance companies and banking type institutions. As applicable to insurance premium finance companies, it has provisions specifying the contents of the agreement (Sec. 8) as well as provisions specifying notice and disposition of assets requirements in the event of cancellation by the premium finance company under a power of attorney. (Sec. 11).

e. The Massachusetts Chapter covering insurance premium finance agencies excludes insurance companies (Sec. 1.2). It does cover banks and financial institutions in general (Sec. 2). Administration is the responsibility of the Commissioner of Banks (Sec. 5) who may issue rules and regulations except that he may [21] not allow less stringent disclosure requirements than those required by the Truth in Lending Act and Regulation Z (Sec. 7). The premium

finance agreement must be on a form approved by the Commissioner of Banks and must disclose certain specified information (Sec. 13). Provision for notice and rights of the parties in event of cancellation of the policy is spelled out in Section 21.

f. Chapter 18 of the Virginia statute which covers insurance premium finance companies expressly excludes banks, trust companies, savings and loan associations and the like from the restrictions and obligations of that Chapter. As applied to insurance premium finance companies, Chapter 18 does require that no premium finance agreement may be used until approved by the Commissioner of Insurance (Sec. 38.1-74). Chapter 18 contains no provisions covering notice and/or disposition of funds in the event of cancellation of a policy by the premium finance company.

g. The Washington State Insurance Premium Finance Company Act covers all persons engaged in the business of entering into insurance premium finance agreements. Banks and other financial institutions are subject to the regulatory provisions of the Act under all premium finance transactions wherein an insurance policy other than life or disability is made security or collateral for the debt. Information to be disclosed in the agreement is specified (Sec. 48.56.080) and provisions are made for notice requirements in event of cancellation by the premium finance company under a power-of-attorney as well as for the return of unearned premiums. (Secs. 48.56.110, 120.)

h. Colorado and Wyoming have adopted the Uniform Consumer Credit Code-Insurance, which requires only advance written notice of the prospective cancellation of property or liability insurance. (See Finding 6 above.) There are no requirements as to the form of or disclosures on a premium finance agreement, nor any as to the [22] distribution of unused premiums.[16]

8. In addition to the activities of hundreds of premium finance companies, premium finance loans are made by banks and other financial institutions (Thornton, Tr. 211-12; obvious also from state laws discussed above which recognize that banks and other financial institutions make insurance premium finance loans). "The banks are interested in this business" (Thornton, Tr. 212).

We turn now to a consideration of *Cochran* v. *Paco, Inc.*[17]

In *Cochran* v. *Paco, Inc.*, the court held that a premium finance

[16] Respondents have failed to call the attention of the undersigned to any enactments in Rhode Island covering the activities of insurance premium finance companies, in which state PPSI is licensed to engage in the General Loan Business (Jaquith affidavit, Tab A; RX 10E).

[17] Discussion is directed primarily to *Cochran* v. *Paco, Inc.*, since the court in that case detailed the reasons for its decision. This is not true of *Lowe* v. *Aarco-American, Inc.*, which is a *per curiam* opinion which treats the sale of insurance by a broker and the financing of premiums by a premium finance company as the credit sale of insurance. This, the court held, is part of the "business of insurance" covered by the McCarran-Ferguson Act exemption.

agreement entered into between an insurance premium finance company licensed under the Georgia Code (§84-5304) and an insured was a part of the "business of insurance" within the meaning of the McCarran-Ferguson Act and so exempt from application of the Truth in Lending Act.

The court recognized that the question involved was "where the 'business of insurance' ends and the business of consumer financing begins." 409 F. Supp. at p. 221. The court also recognized that insurance premium finance companies perform functions similar to those of other finance companies; that, similar to the power of the normal lender to accelerate the debt in the event of nonpayment and to foreclose on the security, which is often the item that has been financed, the insurance premium finance company in the event of nonpayment of installments may exercise a power of attorney to cancel the insurance.

[23] Despite this acknowledged similarity to other finance companies subject to the Truth in Lending Act, the court held that premium finance companies play an integral part in the insurance transaction because the finance company is legally empowered to act as an agent for the insured and terminate the policy, in which event the finance company must comply with strict notice and rebate requirements of the Georgia law. The court reasoned that if the state were not free to regulate premium finance companies, the entire state regulatory structure of insurance contracts could be frustrated.

The court also held that insurance premium financing was part of the business of insurance because if the insured failed to pay installments to the finance company, the result would be the same as if he defaulted in payments to the insurer—the policy would be cancelled; that, therefore, such finance agreements and the finance company's activities have considerable impact on the cost of the policies, the terms thereof, and the likelihood of the insured's recovery in accordance with the terms of the policy; and that there was also a danger of cancellation in the event the finance company failed to make the payments to the insurance companies.

In the opinion of the undersigned, the district court correctly recognized that there were two businesses involved: (1) the business of insurance, which is exempt under the McCarran-Ferguson Act, to the extent regulated by the states; and (2) the business of consumer financing, which is not, regardless of the extent of state regulation. The court incorrectly held that the McCarran-Ferguson Act granted exemption from application of the Truth in Lending Act to the business of consumer financing of insurance premiums reasoning that such business of financing might have an effect upon the

business of insurance. But the McCarran-Ferguson Act did not grant broad, general exemptions to businesses which might affect the business of insurance. The exemption was strictly limited to the business of insurance itself. As developed, *supra,* the business of insurance is conducted by insurance companies. It is also conducted by their brokers and agents. Also, as previously developed, the McCarran-Ferguson Act is to be narrowly construed in the face of valid federal interests to regulate credit financing generally.

[24] "The statute [McCarran-Ferguson Act] did not purport to make the States supreme in regulating all the activities of insurance *companies*" (emphasis in original). *SEC* v. *National Securities, Inc.,* 393 U.S. 453, 459 (1969). Also, *Hamilton Life Insurance Co. of N.Y.* v. *Republic National Life Insurance Co.,* 408 F.2d 606, 611 (2d Cir. 1969). "In *National Securities* the court held that 'the business of insurance' pertained to those activities *peculiar* to the insurance industry. Business activities of insurance companies not peculiar to the insurance industry were found to be subject to federal regulatory laws." (emphasis in original). *American Family Life Assurance Co. of Columbus* v. *Planned Marketing Associates, Inc.,* 389 F. Supp. 1141, 1145 (E.D. Va. 1974).

There is nothing about the lending activities of premium finance companies that is peculiar to the insurance industry. The financing of insurance premiums, even as analyzed by the district court, is very little different from the business of financing the purchase of other commodities on credit. A lender of money cannot be said to be engaging in all the various businesses which furnish goods and services for which the lender provides financing.

While the district court relied upon the fact that when a policy is cancelled by the lender acting under power of attorney authority from the insured, the insurer must give certain statutory notice and comply with rebate requirements, such requirements could continue to be imposed by the states. There is nothing in the Truth in Lending Act that purports to cover such a situation. That Act, as applied to the instant case, involves solely the disclosures made by a lending company at the time it extends credit. Requiring insurance premium finance companies to comply with the Truth in Lending Act would do nothing to impair, and would not touch upon, the area of regulation by the states that comes into play at such time as the lending company, acting for and on behalf of the insured, takes action with respect to the insurance policy. Therefore, the concerns of the district court with respect to the matters which it considers a state must be

free to regulate in the event of cancellation of a policy, are not involved in the instant case.[18]

[25] In both *Lowe* v. *Aarco-American, Inc.* and *Paco* v. *Cochran,* the courts relied upon the existence of state statutes regulating the activities of premium financing companies—statutes of Illinois and Georgia, respectively. The enactment of such statutes, however, does not make the business of premium finance companies the business of insurance.[19] In any event, the interpretation of what constitutes the business of insurance is a federal, not a state, question. *Fry* v. *John Hancock Mutual Life Insurance Co.,* 355 F. Supp. 1151 (N.D. Texas 1973); *Monarch Insurance Co.* v. *Commissioner of Internal Revenue,* 420 F.2d 36 (7th Cir. 1969).

As developed during the hearings, PW deliberately does not sell insurance on credit for the very reason that such insurance transactions would be to the disadvantage of PW. The states, other than Texas, would treat such transactions as "non-admitted" with financial repercussions to PW (see Finding 1, *supra*). It is for this reason that PW and other insurance companies do not sell insurance on credit, but arrange for others to finance the cost of the policy for the insured.

It would be incongruous to hold that a deliberate effort on the part of an insurance company to arrange for the extension of credit by another so it will not be considered a part of the insurance transaction by the states should, nevertheless, be held to be a part of the business of insurance in order to bring into play the McCarran-Ferguson Act. Since states do not recognize the financing of insurance premiums by third parties as a part of the business of insurance for the purpose of evaluating insurance companies, such transactions should not be considered as a part of the business of insurance for the purpose of bringing into effect the McCarran-Ferguson Act exemption.

[26] Insurance premium finance loans are made by banks and other financial institutions as well as by premium finance companies (Finding 8, *supra*). Using the ten states in which PPSI has conducted the business of insurance premium financing, we find that the Connecticut, Florida, Kentucky and Virginia statutes which apply to insurance

[18] Note, for example, the Texas law covering the financing by insurance premium finance companies (Title 79, Ch. 12, RCS, 1925, as amended), which specifically provides that the Truth in Lending Act and the applicable portions of Regulation Z shall prevail in the event of a conflict with state law (Article 12.12), and then goes on to impose notice and return of unearned premium requirements when a premium finance company cancels the contract of insurance under a power of attorney authority (Article 12.17).

[19] In addition to Illinois, where insurance companies are not subject to statutory specifications covering the form and content of premium finance agreements, other states in which PPSI was licensed to engage in business also specifically exclude insurance companies from coverage of premium financing company legislation. These are Connecticut, Kentucky and Massachusetts. See Finding 7, *supra.*

premium finance companies expressly exclude banks and similar financial institutions from their coverage. And in Washington, banks and other financial institutions are subject to the regulatory provisions of that state's premium finance company act only where an insurance policy other than life or disability is made security or collateral for the debt. (Finding 7, *supra*).

Thus, the very same type of loan for the purpose of paying insurance premiums would, under *Lowe* v. *Aarco-American, Inc.* and *Cochran* v. *Paco, Inc.*, be exempt from the Truth in Lending Act depending upon whether the loan was made by an insurance premium finance company or by a bank or other similar financial institution. Certainly, the very same type of loan as that made by a bank does not become a part of the business of insurance because it is made by an insurance premium finance company. In neither case is the loan a part of the business of insurance.

It is noted that Section 108 of the Truth in Lending Act specifically provides that banks, savings and loan associations and credit unions are to be covered by the Act with enforcement as to such lending institutions committed to various named government agencies; and that the Federal Trade Commission is given enforcement authority with respect to all types of lenders not specifically committed to some other government agency. This again evidences the intent that loans of the nature here involved, whether provided by banks and the like or by insurance premium finance companies, are subject to the provisions of the Truth in Lending Act.

There is still another aspect of the inapplicability of the McCarran-Ferguson Act exemption to the instant case—and that is with respect to the allegations of Count I of the complaint dealing with misrepresentations made to alleged delinquent debtors by PPSI in the course of efforts to collect alleged delinquent accounts. As has been developed, these delinquencies arise after the creditor has cancelled the insurance policy and has offset all unused premiums which have been returned by the insurance company (Findings [27] 2(b) 4). At this point, there is no longer a policy of insurance. PPSI is not attempting to collect unpaid premiums. There are no unpaid premiums. PPSI simply is a creditor attempting to collect monies due it by debtors. Under no stretch of the imagination (or stretch of application of the McCarran-Ferguson Act) can this collection attempt be deemed to be a part of the business of insurance.

The undersigned's holding as to the McCarran-Ferguson Act exemption and its lack of application to the activities of PPSI made in the course of denying respondents' motion for summary decision is

reaffirmed as the correct disposition of the issue in question for the reasons there stated and as supplemented herein.

This holding, however, is inapplicable to PW's sale of insurance on credit in Texas. In Texas, as part of the business of selling insurance, the insurance company takes a note in payment of the insurance premium and collects on the note (Finding 1). Unlike the situation when PPSI is utilized, the insurance company has not received the entire premium, but rather the insured is paying the premium on time to the insurance company. This method of paying premiums centers around the contract of insurance and the relationship between the insurance company and the policyholder—matters which were held in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 459-460 (1969), to be the core of the "business of insurance" as that term is used in the McCarran-Ferguson Act. And see those cases cited at pages 12 and 13, *supra*, which were distinguished in their application to PPSI because PPSI is not an insurance company.

National Securities, Inc. also makes it clear that the "McCarran-Ferguson Act was an attempt * * * to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation," and that "fixing of rates is part of" the "business of insurance." 393 U.S. at pp. 459, 460. The premiums paid on an insurance policy is a key element of the business of insurance. *Proctor* v. *State Farm Mutual Automobile Insurance Co.*, C.A. No. 249-72 (D.D.C. December 18, 1975). And this includes the payment of premiums on time. *Gerlach* v. *Allstate Insurance Co.*, 338 F. Supp. 642, 649 (S.D. Fla., 1972); *Ben* v. *General Motors Acceptance Corp.*, 374 F. Supp. 1199, 1201 (D. Colo. 1974).

[28] I conclude, therefore, that PW's sale of insurance on credit in Texas is part of the "business of insurance" within the meaning of the McCarran-Ferguson Act. The next question is whether PW's activities are regulated by the State of Texas.

As part of its Insurance Code, Texas has passed an act to regulate trade practices in the business of insurance within the intent of the McCarran-Ferguson Act "by defining, or providing for the determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." Texas Insurance Code, Article 21.21, Sec. 1.

A state "regulates" the business of insurance when it generally proscribes or authorizes certain conduct on the part of insurance companies. *California League of Independent Producers* v. *Aetna Casualty & Surety Co.*, 175 F. Supp. 857, 860 (N.D. Cal. 1959); *Holly Springs Funeral Home* v. *United Funeral Service*, 303 F. Supp. 128,

135 (N.D. Miss. 1969). State power to regulate, established by the McCarran-Ferguson Act, also includes the discretion to permit practices which might otherwise violate federal law. *Dexter* v. *Equitable Life Assurance Society of the United States,* 1975-2 Trade Cases ¶60,601, at p. 67,665 (2d Cir. 1957).

Texas has enacted regulatory legislation for the very purpose of meeting the intent of the McCarran-Ferguson Act and covering all practices intended to be encompassed within the state as unfair methods of competition and unfair or deceptive acts or practices, the very language of the Federal Trade Commission Act. Thus, Texas has effectively pronounced what shall be prohibited and what shall be permitted. PW's activities in selling insurance on credit in Texas, therefore, are deemed regulated by that state and so exempt under the McCarran-Ferguson Act. See *Crawford* v. *American Title Insurance Co.,* 518 F.2d 217, 218-19 (5th Cir. 1975).[20]

Corporate Respondents[21]

9. Respondent Providence Washington Insurance Company (PW) is a corporation organized, existing and doing business [29] under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 20 Washington Place, Providence, Rhode Island (Admitted, PW Answer 1.1;[22] Stipulation No. 1).

10. Respondent Providence Premium Service, Inc. (PPSI), formerly M. V. Service, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 20 Washington Place, Providence, Rhode Island (Admitted, PPSI Answer 1.1; Stipulation No. 2).[23]

11. Respondent PPSI is wholly owned by respondent PW through PW's wholly-owned subsidiaries Motor Vehicle Casualty Company and York Insurance Company (Admitted, PW Answer 1.2; PPSI Answer 1.2; Stipulation No. 3).

Business of PPSI and Jurisdiction of Commission over Challenged Activities of PPSI

12. PPSI has been engaged in the business of financing insurance premiums prior to October 1, 1974 (Admitted, PPSI Answer 2.2;

[20] Complaint counsel do not appear to contest this conclusion (Br., pp. 25-26).

[21] Findings 9-15 are taken from the undersigned's partial summary decision of May 27, 1976. Finding and footnote numbers have been changed to correspond with overall numbering sequences used in this initial decision.

[22] While references throughout are to answers of particular corporate respondents, it is noted that each respondent has incorporated as part of its answer the answers of the other respondents.

[23] The summary decision erroneously recited that PPSI was a Rhode Island corporation.

Stipulation No. 5). During all or a portion of the period of time from January 1, 1972 to October 1974, respondent PPSI was licensed to engage in the business of financing insurance premiums in the States of Colorado, Connecticut, Florida, Illinois, Kentucky, Massachusetts, Rhode Island, Virginia, Washington, and Wyoming (Admission No. 28; Stipulation No. 6).

13. In the course and conduct of its business as aforesaid, PPSI is now, and for some time last past has been, engaged in oral and written communications with debtors located in various States of the United States (Admitted, PPSI Answer 3; Stipulation No. 8).

[30] 14. Based on Findings 12 and 13 above, it is found that PPSI maintains, and at all times relevant has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act. (See also, PPSI Answer 3).

Competition

15. In the course and conduct of its business, and at all times mentioned herein up until October 1, 1974, PPSI has been in substantial competition in or affecting commerce with corporations, firms, and individuals engaged in providing services of the same general kind and nature as those provided by PPSI (Admitted, PPSI Answer 7).

COUNT I—DEBT COLLECTION VIOLATIONS

16. In the course and conduct of its business, and for the purpose of inducing the payments of alleged delinquent accounts, PPSI mails or causes to be mailed to alleged delinquent debtors various form letters and other printed material (Admitted, PPSI Answer 4.1).

17. Examples of form letters sent prior to October 1974 are the following:

a.[24]

James P. Travers
Attorney at Law
20 Washington Place
Providence, Rhode Island 02901

Dear ————:

I represent M. V. Service, Inc.[25] in its claim against you for ———— due on the account listed below. Please contact this office and arrange to settle this

[24] For exhibits of this type, see CX 37, 39, 41, 42, 44, 45, 47, 49 and 50.

[25] M. V. Service, Inc. is the name formerly used by PPSI. (See Finding 10, *supra*).

account without delay. If I fail to hear from you, appropriate legal action will be taken.

Very truly yours,

James F. Travers

Acct. No. ————

[31] b.[26]

James F. Travers
Attorney at Law
20 Washington Place
Providence, Rhode Island 02901
Tel: (401) 331-6612

Dear ————:

This is your final notice. I wrote you on ———— making claim against you for ———— due M. V. Service, Inc. I have received no reply. If I fail to hear from you within 15 days of the date of this letter, legal action will be started against you without further notice.

Very truly yours,

James F. Travers

(Admitted, PPSI Answer 4.1; Stipulation No. 9)

18. By and through the use of the letters described in paragraph 17 above, PPSI has represented, directly or by implication, to those to whom said letters are mailed, that PPSI has referred delinquent accounts to an independent, third-party attorney for collection and institution of legal action, and that failure to remit payments or to arrange for settlement of delinquent accounts immediately or within a stated period of time, will result in the institution of legal action by said third-party attorney. That these representations were made is clear from an examination of the letters themselves.

19. Both letters are on the letterhead of "James F. Travers, Attorney at Law, 20 Washington Place, Providence, Rhode Island 02901" and purport to be signed by James F. Travers. Nothing in either letter indicates that Travers [32] is an employee of PW acting in an employee capacity.[27]

20. In the first letter (CX 37), Travers states, "I represent M. V.

[26] For exhibits of this type, see CX 38, 40, 43, 46, 48 and 51.

[27] As developed at the hearings, Travers has a private line that goes directly to his office rather than through the PW switchboard. This is the same number that appears on the letterhead of the collection letters. Travers or his secretary, who also works for PW, would answer the phone. Travers tried to answer his own telephone. If a recipient of a collection letter would call in response to the letter, Travers would not tell him that he was an employee of PW (Travers, Tr. 122-123, 132).

Service, Inc. in its claim against you* * *" and requests that the addressee contact "this office" to settle the account; that if "I fail to hear from you" appropriate legal action will be taken. The representation is clearly made that Travers, an independent attorney at law, is in that capacity representing M. V. Service, Inc., has had the delinquent account turned over to him for collection and will institute legal action if he does not hear from the debtor.

21. The followup letter (CX 38) is also on Travers' letterhead and, like the first, identifies James F. Travers as an Attorney at Law, 20 Washington Place, Providence, Rhode Island. Again, reference is made to the sender of the letter in terms of the singular "I" and the letter reflects that it is Travers, the attorney at law, who previously wrote; that it is Travers, the attorney at law, who has received no reply; and it is Travers, the attorney at law, who is affording the recipient his final notice; and that if Travers, the attorney at law, does not hear from the alleged debtor within 15 days, he will institute legal action without further notice.

22. Contrary to the representation made when the letters were sent, the accounts in question had not been referred to a third-party attorney for institution of legal action (PPSI Answers 5.1, 6.1). While PPSI asserts that it has, on occasion, instituted legal action to collect delinquent accounts (PPSI Answer 6.2), this answer does not negate the false representation that the accounts had already been referred to a third-party attorney who was immediately prepared to institute legal action upon the expiration of 15 days unless he heard from the alleged debtor within that time.

[33] Findings 16 through 22 above are adopted from the undersigned's order granting partial summary decision and are still appropriate for ultimate disposition of this case. These findings are supplemented by the following which reflect what was further developed during the course of hearings.

23. James F. Travers, while admitted to practice as an attorney at law in Massachusetts and Rhode Island, has been an employee of PW for 27 years. He has been an assistant vice president since January 1973, and was secretary of PW prior to that time. His duties are varied, but he is primarily in charge of audits and is responsible for insurance claims that are in excess of $25,000. Occupying an office at PW's 20 Washington Place, Providence, Rhode Island, place of business, he is nowhere on the premises identified as an attorney at law. Other than for his connection with the debt collection form letters reproduced in Finding 17, for which he received no compensation from PPSI, Mr. Travers is not engaged in the practice of law (Travers, Tr. 116, 127, 133).

24. The collection letters were prepared by Mr. Travers in conjunction with Mr. Russell Bray, then General Manager of M. V. Service, Inc. The letters were prepared some time in 1971, when Bray approached Travers and requested his assistance in M. V. Service, Inc.'s[28] collection efforts (Travers, Tr. 117-118, 127).

25. Travers, however, had little or nothing to do with the utilization of the collection letters. They were automatically prepared and sent out by PPSI employees according to an established PPSI routine. Mr. Franklin D. Iavelo, General Manager of PPSI (and General Manager Bray before him), instructed PPSI's employees to fill in the blanks on the form letters and send them out as appropriate. A reproduction of Travers' signature was already imprinted on the forms and he would not even know that a collection letter over his signature had been sent. He did not see the letters and had nothing to do with them.[29] If no response was received, he would know [34] nothing about it. He would take no action. The entire matter was handled by PPSI personnel (Iavelo, Tr. 82-84, 99-100, 105; Travers, Tr. 120-122, 124-125).

26. If Travers was contacted by telephone by a recipient of a form letter, he would relay any message to PPSI's General Manager for his action. If there were any disputes, the caller would be referred to PPSI's General Manager. Any mail responses would similarly be referred (Iavelo, Tr. 84; Travers, Tr. 121-124).[30]

27. The form letters were automatically prepared and sent out as part of a routine before the accounts were to be turned over to a collection agency. Travers never instituted legal action to collect any accounts. While the second collection letter gave 15 days, following which legal action was to be instituted without further notice, after about 30 days, if payment had not been made, PPSI's General Manager would choose accounts to turn over to a collection agency. Some of the smaller accounts would not be so referred, but would be dropped. Accounts were not specifically sent to collection agencies for institution of suits. They were sent for purposes of dunning, which was followed, in some instances, by institution of legal action by the collection agency. These were the only legal actions ever instituted to

[28] As PPSI was formerly called M. V. Service, Inc., the two names are being used interchangeably (See Finding 10).

[29] A copy of the letter would be sent for Travers' files so he could refer to it in the event he received a telephone response. For the first few months, the form letters were given to Travers for signature. This was too much bother, so presigned forms were substituted to avoid inconveniencing him (Travers, Tr. 120-122).

[30] The only action Travers would ever take would be to grant an extension of time for making payments or agree to a settlement of the account for a lesser amount. This was more or less automatic because of the relative small amounts of the debts and the anticipated problems in collecting (Travers, Tr. 121, 129-130). This lends additional weight to the conclusion that institution of legal action was not truly contemplated.

collect on the outstanding accounts (Iavelo, Tr. 84, 99-100, 105-106, 111; Travers, Tr. 124, 134).

28. PPSI annually handled 15,000 to 18,000 insurance premium finance accounts. The form letters in question were sent to about 10 percent or to 1,500 to 1,800 accounts annually (Iavelo, Tr. 85).[31] The form reproduced in Finding 17(a) was sent first, followed within a reasonable length of time by the form reproduced in Finding 17(b) (CX 37-40, 42, 43, 45-47, 48-51; Iavelo, Tr. 82).

[35] 29. It is clear from the foregoing that, contrary to the representations made in the form letters, the accounts in question had not been referred to an attorney for the institution of legal action. PPSI simply arranged to utilize the name and stationery of an employee of its parent corporation who was in fact an attorney, but who was not practicing his profession. The collection letters were prepared and transmitted by PPSI employees without the participation, indeed without the knowledge, of the attorney whose name was utilized.

30. Further, failure to remit payment or arrange to settle delinquent accounts immediately or within a stated period of time would not result in the institution of legal action. PPSI did not institute legal action to collect delinquent accounts as threatened in the collection letters, either through the attorney whose name was mentioned or otherwise.

31. Any institution of legal action was unrelated to the threats contained in the collection letters. To the extent legal action may have taken place, it followed events after a subsequent determination to send selected accounts to collection agencies for purposes of dunning. And see Finding 22.

32. Therefore, the statements and representations contained in the collection letters reproduced in Finding 17 and the acts and practices engaged in in connection with said letters are false, misleading and deceptive and are to the prejudice and injury of the public. The use by PPSI of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that such statements and representations were true and into the payment of substantial sums of money to PPSI by reason of said erroneous and mistaken belief. This may be inferred from the very nature of the practice and the large number of

[31] Travers' estimate was that a total of 400 to 500 letters were utilized from 1971 through August 1974, although he later stated he had no real basis for his estimate (Travers, Tr. 128, 131-132). Iavelo is deemed by far the better authority in this regard. Travers' estimate reflects his lack of knowledge as to the letters that were sent. Under either estimate, the number sent was substantial.

instances in which it was utilized from 1971 until August 1974 (Finding 24; Travers, Tr. 125).

The following, taken from the undersigned's order of May 27, 1976, granting partial summary decision to complaint counsel is fully applicable to the findings and conclusions now reached with respect to Count I of the complaint.

[36] The false and deceptive nature of the letters is evident from a reading thereof. They sufficiently and convincingly demonstrate their tendency or capacity to mislead or deceive. Evidence of deception is not required, either in the nature of consumer testimony or a sampling of public opinion. *Montgomery Ward & Company, Inc.* v. *FTC*, 379 F.2d 666, 670 (7th Cir. 1967); *Double Eagle Lubricants, Inc.* v. *FTC*, 360 F.2d 268, 270 (10th Cir. 1965); *Zenith Radio Corp.* v. *FTC*, 143 F.2d 29, 31 (7th Cir. 1944); *Charles of the Ritz Dist. Corp.* v. *FTC*, 143 F.2d 676, 679-680 (2d Cir. 1944). Further, even if a statement may be construed in a literally true fashion, if susceptible of a misleading interpretation, it will be construed against the user thereof. *Murray Space Shoe Corp.* v. *FTC*, 304 F.2d 270, 272 (2d Cir. 1962); *Ward Laboratories, Inc.* v. *FTC*, 276 F.2d 952, 954 (2d Cir.), *cert. denied*, 348 U.S. 826 (1960).

The acts and practices of PPSI recited in the above findings made under Count I constitute unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

It is clear that false representations were made that would have the tendency or capacity of inducing recipients of the letters to take prompt action with regard to their alleged debts. This falls in the general category of false and deceptive acts and practices violative of Section 5 of the Federal Trade Commission Act. A number of cases have so been decided which involve comparable representations of a claim having been turned over for collection to a third party or the threat to take prompt legal action in the event steps leading to payment are not taken. See, *e.g.*, *William H. Wise Co.* v. *FTC*, 246 F.2d 702 (D.C. Cir.), *cert. denied*, 355 U.S. 856 (1957), *affirming* 53 F.T.C. 408; *Wilson Chemical Co.*, Dkt. 8474, 64 F.T.C. 168 (1964); *United States Pencil Co.*, Dkt. 5929, 49 F.T.C. 734 (1953); *Teitelbaum*, Dkt. 5930, 49 F.T.C. 745 (1953); *Family Publications Service, Inc.*, Dkt. C-604 (Consent), 63 F.T.C. 971 (1963); *Encyclopedia Britannica, Inc.*, Dkt. 8908 [87 F.T.C. 421], 3 CCH Trade Reg. Rep. ¶21,119 (3/9/76). Further, deception is the evil the statute is designed to prevent and there is violation regardless of whether the alleged debtors may owe

the money. *Floersheim* v. *FTC*, 411 F.2d 874, 878 (9th Cir. 1969), *cert. denied*, 396 U.S. 1002 (1970).[32] [37]

COUNT II — TRUTH IN LENDING ACT VIOLATIONS

33. In the ordinary course and conduct of its business, for a period of time prior to October 1, 1974, PPSI regularly offered to extend and regularly did extend consumer credit as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System (Admitted, PPSI Answer 10.1).

34. Prior to October 1, 1974, customers of PPSI entered into Premium Finance Agreements with it, which agreements contained the only consumer credit cost disclosures provided to said customers. Different forms of said agreements were used from time to time and certain agreements and forms of agreements used by PPSI employees between July 1, 1969 and October 1, 1974 were deficient under Regulation Z (Admitted, PPSI Answer 11.1).[33]

Section 226.8(b) of Regulation Z requires that certain specified disclosures be made in a consumer credit transaction. PPSI has admittedly engaged in consumer credit transactions. Thus, Section 226.8(b) is applicable. Section 226.8(c) of Regulation Z requires that certain additional specified disclosures be made in the case of a consumer credit transaction which is a "credit sale." Section 226.2(t) of Regulation Z defines "credit sale" as meaning "any sale with respect to which consumer credit is extended or arranged by the seller." Section 226.2(h) reads as follows:

> (h) "Arrange for the extension of credit" means to provide or offer to provide consumer credit which is or will be extended by another person under a business or other relationship pursuant to which the person arranging such credit [38]
>
> * * * * * * *
>
> (2) Has knowledge of the credit terms and participates in the preparation of the contract documents required in connection with the extension of credit.

The following findings bear upon whether the extensions of consumer credit here involved were also credit sales within the

[32] Complaint counsel need not establish an intent on the part of respondents to deceive; and good or bad faith on the part of respondents is immaterial in finding a violation. *Feil* v. *FTC*, 285 F.2d 879 (9th Cir. 1960); *Koch* v. *FTC*, 206 F.2d 311, 317 (6th Cir. 1953); *Ford Motor Co.* v. *FTC*, 120 F.2d 175, 181 (6th Cir. 1941). It is also immaterial whether respondents perceived the representations to be false and deceptive. *Gimbel Bros., Inc.* v. *FTC*, 116 F.2d 578, 579 (2d Cir. 1941).

[33] Findings 33 and 34 constitute the incorporation of what were Findings 19 and 20 of the order granting partial summary decision to complaint counsel.

meaning of Sections 226.2(t) and 226.2(h) so that the additional disclosure requirements of Section 226.8(c) are applicable.

35. PW field representatives promoted PPSI premium financing services to insurance broker-agents (Thornton, Tr. 168). These broker-agents were the agents of PW in selling insurance. They had full authority to bind PW pending issuance by PW of the formal policy. These same broker-agents offered the insured the opportunity to secure premium financing for said policies from PPSI (Thornton, Tr. 158, 177, 224-225; RX 10).

36. PPSI sent the insurance agents finance kits which contained the premium finance agreement forms, rate books and all necessary information on how to fill in the blanks on a form. The agents were aware of the credit terms, filled in the disclosure portions of the form and sent the filled-in form to PPSI. PPSI would check the forms and if there were any errors, it would return the forms to the insurance agents for completion or correction. The insurance agents prepared the documents used in connection with the extension of credit (Iavelo, Tr. 87-89, 91-92, 95-97, 106-107; Thornton, Tr. 158-159; RX 10).[34]

From the foregoing, it is obvious that the insurance agents arranged for the extension of credit for purchasers of insurance within the meaning of Section 226.2(h) of Regulation Z. The agents provided and offered to provide consumer credit [39] to be extended by another person under a relationship pursuant to which they had "knowledge of the credit terms and participate[d] in the preparation of the contract documents required in connection with the extension of credit." This, in turn, under Section 226.2(t) of Regulation Z, makes the sale of insurance by PW's agents "credit sales"[35] so that the requirements of Section 226.8(c) of Regulation Z (as well as those of Section 226.8(b)) apply to the credit transactions involved in this case.[36]

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[34] The brokers involved were mostly PW agents (Iavelo, Tr. 88). However, the routine described in Findings 35 and 36 was also followed with respect to financing of insurance premiums owed to companies other than PW (Jaquith affidavit; RX 10A, B). Those broker-agents would then be the agents of the other insuring companies involved.

[35] The holding that these are "credit sales" is solely on the basis of the particular definitions contained in Sections 226.2 (t) and 226.2(h) of Regulation Z for purposes of determining whether the disclosure requirements of Section 226.8(c) apply.

As previously found (Finding 1), PW does not sell insurance on credit except in Texas. The finding that PPSI's credit financing of insurance premiums are "credit sales" under the particular definitions contained in Regulation Z does not undermine the determination that such extensions of credit are not part of the "business of insurance" as that term is used in the McCarran-Ferguson Act.

[36] This conclusion finds support in Federal Reserve Board Public Position Papers No. 225, January 5, 1970, and No. 370, July 7, 1970 (Truth in Lending Manual, Vol. II, pp. E 187 and 243). It is immaterial whether the agent-brokers are themselves considered to be selling insurance, as considered in the Position Papers, or to be acting as agents of the insurance company. Under either concept, the seller is "arranging" for the extension of credit.

37. By and through the use of the agreements referred to in Finding 34, PPSI failed in some instances:

a. To disclose the annual percentage rate computed in accordance with Section 226.5 of Regulation Z as is required in a credit transaction by Section 226.8(b)(2) of Regulation Z. (Admitted, PPSI Answer 11.2(1). Examples of violations where the space for disclosure of the annual percentage rate was left blank are CX 3, 4, 6, 7, 9, 10, 13, 17, 18, 21, 23; see CX 30 and 32 for instances where the rate disclosed was improperly computed.)

[40] b. To disclose the annual percentage rate accurately to the nearest quarter of one percent, computed in accordance with Section 226.5 of Regulation Z as is required in a credit transaction by Section 226.8(b)(2) of Regulation Z. (Admitted, PPSI Answer 11.2(2). The exhibits noted under a. above also evidence violations as here admitted and found. Violations are particularly evidenced by CX 30 and 32 and Travers, Tr. 179).[37]

c. To use the term "cash price," as defined in Section 226.2(i) of Regulation Z, to describe the purchase price of the transaction, as is required in the case of a credit sale by Section 226.8(c)(1) of Regulation Z (Admitted, PPSI Answer 11.2(3); Also evidenced by CX 7 and 9).

[41] Respondents have objected to the admission of CX 7 and 9 as these two exhibits were not signed by the applicants, contending that there is no indication of an executed credit contract. While not signed by the applicants, CX 7 and 9 are as valid applications for the loans as CX 3, 4, 6, 10-15, 17, 18, 21-23, 25-30 and 32-36, which are so signed. CX 7 and 9 are loan application forms which provide a space for the signature of the agent or broker, but not for the insured-applicant. The form itself provides that the application is made on behalf of the insured[38] who is named in the application and reveals that the application is accompanied by the insured's check or money order payable to the order of M. V. Service, Inc., which represents the

[37] Respondents contend that CX 30 and 32 are instances where PPSI followed instructions of Rhode Island authorities not to show annual percentage rates in excess of 21 percent (the normal limit in Rhode Island without violating usury laws) in instances where the finance charge was under $10.00 (Thornton, Tr. 179-180; RX 1). As acknowledged by respondents, however, (Br. 19), state rulings inconsistent with federal law are superseded by federal law.

PPSI has alleged that failure accurately to disclose the percentage rate as required by Section 226.8(b)(2) of Regulation Z were overstatements, not for the purpose of circumvention or evasion of disclosure requirements and, hence, pursuant to Section 226.8(h) of Regulation Z, are not a violation of the regulation. The exhibits and testimony noted above, however, reveal (1) failures to make any annual percentage rate disclosures and (2) understatements of the annual percentage rate.

Thornton testified that annual percentage rates disclosed as 21 percent were actually as high as 40, 48, 50 or 60 percent (Tr. 179). CX 30 and 32, which disclosed 21 percent annual rates, should have revealed true rates of 50 and 90 percent, respectively (CX 52, 53).

[38] William P. Thornton, General Counsel, Corporate Secretary and member of the Board of Directors of PW (Tr. 134), considers that, in some instances, the broker or agent is the agent of the insured (Tr. 225).

downpayment and all matured payments; and that a copy of the application has been retained by the insured. It is clear, therefore, that an insured has made as valid and binding an application for credit on the CX 7 and 9 type application form as he has on others in the record, subject only to approval by PPSI.

The CX 7 and 9 type form does not use the term "cash price" to describe the purchase price of the transaction. CX 9 being dated July 13, 1971, and CX 7 being dated November 16, 1972, it is obvious that this deficient form was in use for an extended period of time. There is no reason not to believe that many such forms were utilized over a substantial period of time and that many such applications were accepted.[39] In any event, as noted above, [42] the violation has been admitted.[40]

d. Failed to use the term "cash downpayment" to describe the downpayment in money as is required in the case of a credit sale by Section 226.8(c)(2) of Regulation Z (Admitted, PPSI Answer 11.2(4); violation also evidenced by CX 3, 4, 6, 7, 9-15, 17, 18, 21-23, 25-30 and 32-36).

e. Failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as is required in the case of a credit sale by Section 226.8(c)(3) of Regulation Z (Admitted, PPSI Answer 11.2(5); violation also evidenced by CX 3, 4, 6, 7, 9-15, 17, 18, 21-23, 25-30, 32-36; RX 2; Thornton, Tr. 176).[41]

Respondents point out that the enumerated disclosures required by Section 226.8(c) of Regulation Z are prefaced by the phrase "the following items, *as applicable,* shall be disclosed." (Emphasis added.) Respondents argue that since the "amount financed" is disclosed and this amount is exactly the same as the "unpaid balance of cash price," there would be no point in making the same disclosure again—that the requirement of Section 226.8(c)(3) is not *applicable.*

I do not so read Section 226.8(c). It is well recognized that the requirements of Regulation Z are intended to provide credit disclosures in a uniform and complete manner so that borrowers may get

[39] Respondents assert (Br. 22-23) that the CX 7 and 9 form was printed May 1969 (a fact not apparent on the exhibits as respondents state), prior to the July 1, 1969 effective date of Regulation Z, so that there is no basis for inferring that this type application was used or accepted after Regulation Z became effective. These documents, however, dated in 1972 and 1971, respectively, were uncovered in PPSI's files and are authentic (Tr. 42, 47-49, 56). When applications were unacceptable, they would be returned to the agent (Iavelo, Tr. 91-92, 95-97, 106-107). Further, the preparation of the form so close to the effective date of Regulation Z gives rise to the inference that it was prepared in contemplation thereof.

[40] Paragraph Eleven of the complaint very clearly alleges failures to comply with requirements of Regulation Z subsequent to July 1, 1969, the effective date thereof. Respondents cannot, at this late date, attempt to avoid the effect of admissions of failure to comply with such requirements by asserting, as they have (Br. 23 n. **), that they might have been admitting to omissions in forms prior to July 1, 1969.

[41] Downpayments were always cash, usually in the form of checks (Iavelo, Tr. 92-93, 101).

all of the information to which they are entitled and so may more easily compare the terms of one credit offer with that of another. Information as to "unpaid [43] balance of cash price" and "amount financed" are both applicable to the credit transactions here involved.[42] If creditors were to be allowed to choose which of the terms to use when disclosing required information, as PPSI has done,[43] the purpose of Regulation Z would be defeated.

f. Failed to use the term "amount financed" to describe the amount of credit extended, as is required in the case of a credit sale by Section 226.8(c)(7) of Regulation Z (Admitted, PPSI Answer 11.2(6); evidenced also by CX 7 and 9).[44]

g. Failed to use the term "finance charge" to describe the sum of all charges, as required by Section 226.4 of Regulation Z to be included therein, as is required in the case of a credit sale by Section 226.8(c)(8)(i) of Regulation Z (Admitted, PPSI Answer 11.2(7); evidenced also by CX 7 and 9).[45]

h. Failed to use the term "total of payments" to describe the sum of the payments scheduled to repay the indebtedness, as is required in a credit transaction by Section 226.8(b)(3) of Regulation Z (Admitted, PPSI Answer 11.2(8); evidenced also by CX 7 and 9).[46]

[44] i. Failed to disclose the "deferred payment price" as described in Section 226.8(c) (8)(ii) of Regulation Z and as is required in the case of a credit sale by that Section (Admitted, PPSI Answer 11.2(9); evidenced also by CX 3, 4, 6, 7, 9-15, 17, 18, 21-23, 25-30 and 32-36).[47]

j. Failed to make all disclosures required by Regulation Z clearly, conspicuously, and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

The violation of Section 226.6(a) of Regulation Z follows from the violations recited above in Findings 37a-i.

The failures to conform with the requirements of Regulation Z, as recited in Finding 37 above, constitute violations of Sections 226.6(a), 226.8(b) and 226.8(c) of Regulation Z, as indicated in such finding, and hence are violations of the Truth in Lending Act and, pursuant to

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[42] This conclusion finds support in Federal Reserve Board Public Position Paper No. 370, July 7, 1970 (Truth in Lending Manual, Vol. II, p. E 243).

[43] Until preparation of RX 2 in June 1973, PPSI's forms used neither the term "unpaid balance of cash price," as required by Section 226.8(c)(3), nor the term "deferred payment price," as required by Section 226.8(c)(8)(ii). (See Finding 37i, *infra*.) When William Thornton, Jr. prepared the revised form RX 2 in June 1973, *he elected* to include the term "deferred payment price" as preferable to use of the term "unpaid balance of cash price" (Thornton, Tr. 175, 215).

[44] See discussion of CX 7 and 9 under Finding 37c. above.

[45] See discussion of CX 7 and 9 under Finding 37c. above.

[46] See discussion of CX 7 and 9 under Finding 37c. above.

[47] Findings 37a-i, expanded by discussion and record citations, are derived from Finding 21 of the undersigned's partial summary decision of May 27, 1976.

Section 108(c) of that Act, 15 U.S.C. 1607(c), constitute violations of the Federal Trade Commission Act.

LIABILITY OF RESPONDENT PROVIDENCE WASHINGTON INSURANCE COMPANY

38. As already established (Finding 11), PPSI is wholly owned by PW through PW's wholly-owned subsidiaries Motor Vehicle Casualty Company and York Insurance Company. PW, in addition, owns Western Alliance Insurance Company, Providence Lloyds (at one time called Texas Casualty Insurance Co.), a non-incorporated insurance organization, Providence Washington Insurance Company of Alaska, and Providence Washington General Agency of Alaska. All of these companies together with Providence Washington Life Insurance Company, which at one time was a subsidiary of PW but was transferred to another corporation for tax reasons, are known as the "Providence Washington Group." The Providence Washington Group has no legal entity. It is just a grouping of companies that do business together in the sense that their facilities are offered in a package to insurance agents of PW (Thornton, Tr. 139-142, 155, 222).

[45] 39. Booklets promoting PPSI's premium financing service are distributed to PW's agent-brokers. The covers of these booklets list a number of the insurance companies in the Providence Washington Group (including PW) and identify them as the Providence Washington Insurance Group. PPSI is described on the cover as "A Facility of the Providence Washington Insurance Group" (RX 2; Tr. 113).

40. M. V. Service, Inc. (PPSI) was acquired in 1963 by PW as part of a package deal along with three insurance companies: Motor Vehicle Casualty Company, Farmers Equitable Insurance Company, whose name was later changed to York Insurance Company, and Farmers Equitable Life Insurance Company. All were acquired from the same source (Thornton, Tr. 171).

41. PW was founded in 1799 and is the third oldest insurance company in the country. It writes just about every type of insurance written by a non-life company and operates in almost every state. PW was acquired by Gulf and Western Industries in the late 1960's. Gulf and Western transferred PW's stock (99.3 percent thereof) to Gulf and Western's subsidiary, Associates Corporation of North America. Later, in September 1974, PW's shares were transferred to Associates First Capital Corporation, which is the parent of Associates Corporation of North America (Thornton, Tr. 135-136, 142-143, 153-154).

42. PW and PPSI share a common management.

a. Deane S. Jaeger was President of PW from January 1, 1972 to

October 1974, and Chairman of the Board of Directors of PPSI from January 1, 1972 to October 1974 (Admission Nos. 1 and 2).

b. Fred L. Jaquith is a member of the Board of Directors of both PW and PPSI and has served in these capacities from January 1, 1972 to October 1974 (Admission Nos. 3 and 4).

c. James R. Thwing is a member of the Board of Directors of both PW and PPSI and has served in these capacities from January 1, 1972 to October 1974 (Admission Nos. 5 and 6).

[46] d. Christopher F. Kempf is, and has been since September 20, 1971, a Senior Vice President of PW (Admitted, PW Answer 1.3); is, and has been since at least January 1, 1972, President of PPSI (PPSI Answer 1.3; Admission No. 9); is, and has been from January 1, 1972 to October 1974, a member of the Board of Directors of PPSI (Admission No. 8); and is, and has been from January 1, 1972 to October 1974, a member of the Board of Directors of PW (Admission No. 7).

e. At least from January 1, 1972 to October 1974, there was a direct line of authority from the President of PW to the office manager of PPSI, to the extent that Deane S. Jaeger, President of PW, was, between January 1, 1972 and October 1974, the immediate supervisor of Christopher F. Kempf, Senior Vice President of PW (Admission No. 11), who in turn, during the period of time from January 11, 1973 to October 1974, as President of PPSI, was the immediate supervisor of Frank Iavelo, Office Manager of PPSI (Admission Nos. 19 and 20).[48]

43. PW and PPSI share the same address at 20 Washington Place, Providence, Rhode Island (Findings 8 and 9, *supra*). The building is a four-story affair. PW usually accommodates at least one other tenant. The only designation on the outside of the building is Providence Washington Insurance Company. There is a central reception hall but no directory indicating where anything else is in the building. One who signs in and gets a visitor's pass ascertains from the receptionist where the various departments of PW are.[49] PPSI is located in an area which is part of one floor that is set apart from other areas by a six-foot high partition with an identifying sign on it. This is where its business was transacted (Thornton, Tr. 203-204).

[47] 44. PW and PPSI shared a common mailroom.[50] PPSI also utilized PW's computer which was operated by PW personnel. PPSI had five employees, in addition to the General Manager, in its

[48] Finding 42 reflects Finding 10 of the May 27, 1976 order granting partial summary decision.

[49] Witness Iavelo testified that there was a directory type sign in the lobby of the building which identified where each department of PW was located and also listed PPSI (Tr. 103).

[50] PPSI would be billed monthly for its share (Iavelo, Tr. 82-83).

Providence, Rhode Island office, whose payroll and personnel records were maintained by PW. PPSI employees were also covered by the PW retirement plan. The employees of PPSI were paid by checks drawn on the account of PW through the bookkeeping department of PW. While PPSI had a different phone than that of PW, the phone was billed through PW. PPSI would make reimbursement. PPSI was also billed for a rental charge (Iavelo, Tr. 82-83, 85-86, 87, 89, 90, 104).

45. Thornton has testified that PPSI had money available for insurance premium loans through some capital of its own and some earned surplus, but that mostly it utilized borrowed funds from banks and also borrowed money from Associates Corporation of North America, the parent of PW (Tr. 167-168). A September 18, 1974 memorandum from Deane S. Jaeger, then President of PW and Chairman of the Board of PPSI, states that funds used by PPSI have been borrowed from Associates Corporation of North America (RX 3).

46. PPSI's financing services were promoted through PW offices and PW field representatives. As these PW representatives would go from agent to agent trying to induce them to place their better insurance business with PW, they would also try to press them to utilize PPSI's services (RX 3; Thornton, Tr. 168).

47. James F. Travers has been a full-time employee of PW for 27 years. In 1971, he was approached by the general manager of PPSI and was requested to help compose form letters for use by PPSI to aid in their collection efforts. At that time, Travers was Secretary of PW. The collection letters were prepared by Travers in conjunction with the general manager of PPSI. Travers allowed his name and signature to appear on the letters and the telephone number which appears thereon is that of a telephone located in Travers' office on the premises of PW. Service of that telephone was billed to and paid by PW. For the first few months, Travers would sign each letter. Subsequently, pre-signed letters were used. When a recipient of a letter called Travers on the telephone, he was authorized to grant an extension of time for making payments or agree to a settlement of the account for a lesser [48] amount. Copies of collection letters were sent to Travers so he could refer to them when called by recipients thereof. (Admission Nos. 13 and 14; Stipulation Nos. 9 and 10; Travers, Tr. 117-118, 120-122, 129-130, 132; and see Findings 23, 24, 25 and 26).

48. When Travers started working with the PPSI general manager to formulate the letters, Travers notified his immediate supervisor James R. Thwing, Vice President of the Claims Department of PW, and Mr. Thwing said it was a fine project. Thwing was also aware of the arrangement under which letters went out, calls were received by

Travers and Travers reached working agreements with the alleged debtors (Travers, Tr. 118-119, 124).

49. Travers spoke with the general manager of PPSI after learning that the Federal Trade Commission had submitted a proposed consent decree covering the practice with the letters. Travers told the general manager to stop using the letters and their use was stopped (Travers, Tr. 126, 130).

50. William P. Thornton was employed by Associates Corporation of North America, the parent of PW, in August 1972 to serve as counsel for PW and, in that capacity, to attend to the legal needs of PW and its subsidiaries, including PPSI and other members of the Providence Washington Group. He was the only attorney on the scene in Providence. After his arrival, he saw the Travers collection letters and was asked to substitute his name for Travers'. He refused since he did not want to get involved in collecting small amounts and answering the phone. As part of his duties, either late 1972 or early 1973, he reviewed the forms and practices of PPSI. He discovered what he considered to be shortcomings on the forms and brought them to the attention of PPSI personnel. He prepared a revised form, RX 2, in June 1973, which effected various changes. He discovered a particular practice that raised difficulties and worked out a procedure with PPSI which he believed would solve the problem. He also discovered the practice of using the annual percentage rate of 21 percent on Rhode Island finance agreements when in fact the true annual percentage rate was much higher. He directed the general manager of PPSI to stop the practice and to start disclosing the accurate annual percentage rate. When the investigator of the Federal Trade Commission came to the PPSI premises in the summer of 1973, it was Thornton who opened the PPSI files to him and arranged to have copies made of whatever he wanted. During the period in question, Thornton [49] was paid by mail by Associates Corporation of North America. In January 1974, Thornton became Secretary of PW and in September 1974, he became General Counsel of PW (Thornton, Tr. 134-139, 143-145, 147-148, 171-176, 179, 187; Admission Nos. 23 and 24).

Discussion

In *P. F. Collier & Son Corp.* v. *FTC*, 427 F.2d 261, 267 (6th Cir.), *cert. denied.*, 400 U.S. 926 (1970), the court stated, "* * *[W]here the public interest is involved, as it is in the enforcement of Section 5 of the Federal Trade Commission Act, a strict adherence to common law principles is not required in the determination of whether a parent should be held for the acts of its subsidiary, where strict adherence

would enable the corporate device to be used to circumvent the policy of the statute."

After sustaining Commission findings to the effect that the parent exercised actual control over the day-to-day policies and operations of its subsidiaries, the court made the following alternative holding (427 F.2d at p. 270):

> In the alternative, however, the law is clear that where a parent possesses latent power, through interlocking directorates, for example, to direct the policy of its subsidiary, where it knows of and tacitly approves the use by its subsidiary of deceptive practices in commerce, and where it fails to exercise its influence to curb the illegal trade practices, active participation by it in the affiars of the subsidiary need not be proved to hold the parent vicariously responsible. Under these circumstances, complicity will be presumed.

In *Beneficial Corp.*, 3 CCH Trade Reg. Rep. ¶20,959 (1975) [86 F.T.C. 119], the Commission applied the principles enunciated in *P. F. Collier & Son Corp.* to hold a parent company vicariously liable for the acts and practices of its subsidiaries. In so doing, it examined the pattern and framework of the whole enterprise which disclosed, *inter alia,* the sharing of a common management, the exercise by the parent of financial control over the affairs of the subsidiaries (including the making of funds available to the subsidiaries to make consumer loans), the provision of services by service subsidiaries, the holding out by the subsidiaries of themselves as being part of a single organizational entity along with the [50] parent, trading by the subsidiaries on the name and goodwill of the parent, establishment by the parent of a retirement plan for the employees of the subsidiaries, and use by the subsidiaries of an advertising slogan of the parent.

Findings 38-50 establish, in substance, all of the above-noted elements relied upon in *Beneficial Corp.* to hold the parent corporation vicariously liable for the challenged acts and practices of the wholly-owned subsidiary. Without belaboring the findings already made, the pattern and framework of the entire enterprise, including the relationship between PW and its personnel and PPSI, even more strongly evidences the latent power of PW to control the acts and practices of PPSI.

It is held, therefore, that PW is vicariously responsible for the acts and practices of PPSI.

Respondents have argued that, to the extent PW may be held liable for the activities of PPSI, this would, in effect, be a finding that PW engaged in financing insurance premiums as a part of its own business of insurance. This is not so. Based upon the pleadings and evidence, the findings are that PPSI, not PW, engaged in financing

insurance premiums; and that PPSI, not PW, violated the Federal Trade Commission Act, the Truth in Lending Act and Regulation Z in the various particulars stated. Further, PPSI has financed insurance premiums paid to other insurance companies and has acted to collect outstanding debts owed to PPSI arising from such other financing (p. 10, *supra*). Such situations are not remotely connected with PW's business of insurance. PW is simply being held vicariously liable for the acts and practices of PPSI for the reasons given above.

As the Commission ruled in *Beneficial Corp.* (at p. 20,814 [86 F.T.C. at 159]), in finding a parent corporation vicariously liable for conduct of its subsidiary, it was not holding "that the subsidiary is a mere tool and its corporate entity a mere fiction."

LIABILITY OF CHRISTOPHER F. KEMPF

51. Christopher F. Kempf is currently Senior Vice President and a director of PW and has been employed by PW for over 25 years. He has been President of PPSI since September 1971, prior to which time he had no experience in premium financing (Kempf, Tr. 229-232).

[51] 52. When Kempf became President of PPSI, he was also a director of three or four PW regional offices. He allocated between 5 and 10 percent of his time to PPSI and the remainder of his time to his position as an officer of PW (Kempf, Tr. 232).

53. While Kempf was in charge of PPSI operations on a general basis and had final authority on matters of substance or policy, he was not involved on a day-to-day basis (Iavelo, Tr. 86; Thornton, Tr. 146, 170; Kempf, Tr. 246).

54. When Mr. Kempf became President of PPSI, Russell Bray was a Senior Vice President and General Manager of PPSI. He was replaced by Frank Iavelo as general manager of the company. Bray was General Manager of PPSI from approximately 1970 to June 1973. Iavelo was General Manager from June 1973 to November 1974. Bray and then Iavelo ran the operations of PPSI (Iavelo, Tr. 77; Travers, Tr. 127-128; Thornton, Tr. 170; Kempf, Tr. 232-233).

55. The collection letters (CX 37 and 38) were the idea of Russell Bray and were drafted by Russell Bray and James Travers (Travers, Tr. 117-118).

56. Kempf did not participate in the preparation or use of collection letters nor in any followup activities (Iavelo, Tr. 82-84; Travers, Tr. 120-122, 126, 128).

57. The PPSI General Manager (Bray or Iavelo) was in charge of setting up, approving or disapproving premium finance applications and agreements (Iavelo, Tr. 78, 88; Kempf, Tr. 245).

58. PPSI employees were under the supervision of the general manager (Iavelo, Tr. 82-85).

In consideration of the foregoing findings (51-58), there is no basis for holding Christopher F. Kempf liable for the unlawful activities here found either in his individual capacity or as a named officer of respondent corporations.[51] [52]

DISCONTINUANCE OF PRACTICES AND WITHDRAWAL FROM BUSINESS

Respondents contend that they have discontinued the practices complained of and that they have withdrawn from the business of premium financing with no likelihood of reentry, so that no cease and desist order is warranted.

59. PPSI withdrew from the premium finance business effective October 31, 1974, and terminated the employment of Iavelo, the premium finance specialist. This followed a deliberate business decision to do so made without relation to the Commission's investigation of PPSI, and was based upon financial considerations, including low profits and losses, the necessity to expend additional capital to beef up PPSI personnel, stiff competition, high interest rate levels and opportunities to invest needed capital in more productive endeavors (Thornton, Tr. 186, 205-207; Kempf, Tr. 233-236, 241; RX 3, 4, 5, 6, 8).

Respondents argue from the above that there is no likelihood of PPSI or any other subsidiary or affiliate of PW entering the insurance premium financing business again; that the same reasons which influenced withdrawal from the business would preclude reentry, particularly now since PPSI no longer has its experienced personnel[52] and would face the costs not only of continuing a going enterprise but of starting up again (Br. 12-14).

60. I do not agree with respondents' contentions. Most of the major insurance companies have subsidiaries that engage in insurance premium financing (Thornton, Tr. 211). PW is an established, major, nationwide insurance company (Finding 41).[53] It has had a wholly-owned subsidiary (PPSI) operating as an insurance premium finance company from 1963 until October 31, 1974 (Thornton, Tr. 171). It is to PW's and PW's agents' financial advantage to have insurance financing available [53] (Finding 1; Thornton, Tr. 195-196).

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[51] Complaint counsel did not submit any proposed findings as to the responsibility of Christopher F. Kempf and their proposed order does not name this respondent.

[52] These "experienced personnel" in the Providence office consisted of the General Manager and five "girls" whom he supervised in performing clerical and routine type functions (Iavelo, Tr. 77, 85, 87, 89, 91-92, 95-96, 100).

[53] The PW group had a projection of $85 million of insurance to be written in 1975 and expects to write $60 million of insurance in 1976 (Thornton, Tr. 153-154).

PW has entered a special contractual arrangement with AFCO, the largest company in the insurance premium field, to arrange for financing in lieu of PPSI. Under this contract, PW is required to make different unearned premium payments to AFCO than it would to any other premium finance company (Thornton, Tr. 226).

61. Under all of these circumstances, it cannot be deemed unlikely that, with a change in economic conditions, PW may reevaluate its economic priorities and have a subsidiary engage in insurance premium financing as do most of its major competitors. There has been no decision to dissolve PPSI (Thornton, Tr. 226); and even if PPSI were dissolved, PW would not be precluded from forming a new corporation.[54]

As for PPSI's asserted lack of capital to begin anew, PPSI has financed its past operations with funds borrowed from Associates Corporation of North America, the parent of PW (Finding 45). Neither should it have difficulty in finding qualified personnel, since there are hundreds of premium finance companies in the field and insurance premium loans are also made by banks and other financial institutions (Finding 8).

62. From 1971 until termination of their use in August 1974, some 1,500 to 1,800 of the Travers collection letters (CX 37, 38) were sent annually (Finding 28). The Commission's investigation at PPSI's place of business commenced in July or August 1973, at which time the Commission investigator secured copies of the collection letters in question (Iavelo, Tr. 79-81). These letters were not discontinued, however, until August 1974, when respondents were proffered a proposed consent agreement by Commission personnel which respondent personnel understood to advise that their collection procedure violated the Federal Trade Commission Act (Iavelo, Tr. 102; Travers, Tr. 124-125).

63. Travers' testimony that there was no likelihood that this type of collection form letter or a similar form would be used in the future was limited to his own personal position that he would not involve himself in something that had been questioned as improper or illegal (Tr. 130-131). However, when Thornton, [54] counsel for PW and legal advisor of PPSI, had an opportunity to examine the Travers letters, he did nothing to stop their use. He was simply interested that his name not be used in collecting small amounts and that he not be bothered with answering the phone (Tr. 143-145).

Thus, the letters were not discontinued until after the hand of the Federal Trade Commission was on the shoulder of the violator, a

[54] Indeed, this is a reason for including PW in the order that is to issue.

circumstance which will not support a conclusion that the practices will not be resumed. *Zale Corp.*, 78 F.T.C. 1195, 1240 (1971).[55] "* * *[T]he fact that illegal conduct has been discontinued does not render a controversy moot * * * [case citations omitted], nor does it cast upon complaint counsel the burden of proving that the practices will be resumed." *Skylark Originals, Inc.*, 80 F.T.C. 339, 354 (1972). Respondents have failed in their burden of establishing that the practices will not be resumed. Travers' testimony noted in Finding 63 falls far short. See *Cotherman* v. *FTC*, 417 F.2d 587, 595 (5th Cir. 1969); *Coro, Inc.* v. *FTC*, 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965).

Respondents (Br. 17-18) take the position that they came into compliance with the Truth in Lending Act in June 1973, when they utilized the revised form RX 2. RX 2 was the Rhode Island form printed in June 1973. It was used as a prototype for forms prepared for other states. The forms were in the process of being prepared when the Commission investigator called on PPSI in July or August 1973 (Iavelo, Tr. 77, 79-81, 107; Thornton, Tr. 107-08; 174).

As already found, however (Finding 37e), RX 2 was deficient in that it did not use the term "unpaid balance of cash price" to make necessary disclosures. But even beyond that, respondents have admitted in their answers that certain agreements and forms of agreements used by PPSI employees from July 1, 1969 until October 1, 1974 were deficient under Regulation Z (Finding 34). This answer admission coupled with the averment in the answers that failure to disclose "unpaid balance of cash price" was not a violation of Regulation Z, constitutes [55] an admission that there were other violations of Regulation Z extending until October 1, 1974. Respondents' answers constituting pleadings under which the hearings were held cannot, at this late date, be circumvented by respondents.

Respondents adduced testimony to the effect that broker-agents were advised to return all outstanding premium finance forms and replace them with the RX 2 type revision (Thornton, Tr. 176). From this they argue that the unauthorized utilization of prior defective forms was the cause of any violations subsequent to dissemination of RX 2. All forms, however, were sent to PPSI for review and acceptance (Findings 2, 36). PPSI, therefore, had the opportunity to review any defective application forms and return them to the agent-brokers for completion of up-to-date forms. If, in fact, any of the admitted violations subsequent to June 1973 were caused by the

[55] "Certainly the mere discontinuance of an offending practice in the face of inquiry by a law enforcement agency can under no circumstances be argued to amount to a defense." *Fedders Corp.*, Dkt. 8932, 3 CCH Trade Reg. Rep. ¶20,825, at 20,693 (1975) [85 F.T.C. 38 at 72].

utilization of superseded forms, PPSI cannot escape responsibility. The forms were sent to PPSI for review and acceptance and PPSI bears full responsibility for accepting such deficient forms. Further, many of the violations on forms executed prior to June 1973, consisted of omissions to fill in particular informative blanks or filling them in incorrectly. The utilization of a revised form would not cure this type of a violation.

In summary, respondents have admitted to failures to comply with specific provisions of Sections 226.8(b) and (c) of Regulation Z. These admitted failures, supplemented by evidence thereof, have been found to constitute violations of Regulation Z. Respondents have further admitted that violations of Regulation Z continued practically until the time PPSI stopped engaging in the business of premium financing. Finally, it has been found that respondents have failed to establish that there is no likelihood that the business will be resumed.

DISCUSSION OF ORDER

Respondents assert that the order should be limited to the specific violations proved. To the contrary, as stated in *P.F. Collier & Son Corp.* v. *FTC*, 427 F.2d 261, 276 (6th Cir.), *cert. denied*, 400 U.S. 926 (1970), "It is well established that 'the Commission has wide discretion in its choice of a remedy deemed adequate to cope with unlawful practices', *Jacob Siegal Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611 * * * (1946) and that, 'it must be allowed effectively to close all roads to the prohibited goal so that the order may not be bypassed with impunity.' *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 * * * (1952). So long as there is a 'reasonable [56] relation' between the remedy and the unlawful practice, the courts will not interfere."

As to Count I, respondent corporations should not be permitted to misrepresent that delinquent accounts have been, or will be, referred to an attorney for institution of legal action, regardless of whether the attorney is an employee of respondents or an independent practitioner. Neither should respondents be permitted to misrepresent that delinquent accounts have been, or will be, referred to any third party, attorney or not, for collection action.

PPSI has not taken action in the past to institute or to cause legal proceedings to be instituted in the collection of delinquent accounts. It has, however, referred delinquent accounts to collection agencies.

Representations as to turning accounts over to attorneys and institution of legal action, therefore, are being prohibited outright.[56] Respondents are being ordered not to misrepresent that delinquent accounts have been or will be referred to a third party for collection action.

As to Count II, Regulation Z having been violated by reason of failure to make certain disclosures required by Section 226, and in the manner required, it is appropriate to prohibit the withholding of other Section 226 disclosures and to insure that all disclosures are made in the required manner. *Virginia Mortgage Exchange, Inc.*, Dkt. 9007, 87 F.T.C. 182, Feb. 10, 1976, at p. 9.[57]

In view of the holding (pp. 27-28, *supra*) that the sale of insurance on credit by PW in Texas is part of the "business of insurance" within the meaning of the McCarran-Ferguson Act [57] regulated by the state, the order excludes PW's activities in connection therewith. There is no need to consider whether such an exclusion would be appropriate with respect to other states, since Texas is the only one in which PW sells insurance on credit.[58]

The theory under which this case was tried was that PPSI, in connection with the extension of consumer credit, as "consumer credit" is defined in Regulation Z, violated certain disclosure requirements of that regulation; and that PW should be held vicariously liable for PPSI's violations. PW was not charged with having violated Regulation Z by reason of its activities in arranging for the extension of consumer credit. The proposed order submitted by complaint counsel, however, would, *inter alia*, apply in connection with any "arrangement for the extension of consumer credit."

When PPSI stopped extending premium financing, PW arranged for AFCO, the largest premium finance company in the field, to carry the financing of PW insureds. PW agents were advised of this arrangement and it was recommended that financing be handled with AFCO (RX 7, 8; Thornton, Tr. 207-208, 226; Kempf, Tr. 243-244). Under complaint counsel's proposed order, PW could be held liable for arrangements made by their agents in securing insurance premium financing by AFCO or any other company. This goes beyond the theory under which this case was tried against PW.

Further, steps taken by an insurance company to arrange for

[56] If changed conditions of fact should justify changing an outright prohibition, respondents may petition the Commission for such change under Section 3.72(b) of the Commission's Rules.

[57] This also disposes of respondents' contention (Proposed Findings and Conclusions, p. 27) that any order should be limited to the form of the agreement used. Further, respondents' violations have gone beyond the utilization of improper forms. They have included instances where information was omitted where spaces for disclosure were provided, as well as instances where incorrect information was inserted.

[58] Again, if changed conditions of fact should justify expanding the exclusion, PW may petition the Commission for such expansion under Section 3.72(b) of the Commission's Rules.

others to extend premium financing may well be deemed a normal and reasonable business effort, part of the business of insurance within the meaning of the McCarran-Ferguson Act.[59]

[58] Accordingly, the provision under discussion appearing in complaint counsel's proposed order does not appear in the order being issued.[60]

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over respondents and the practices of PPSI as herein found.

2. The aforesaid acts and practices of respondent PPSI have violated the Truth in Lending Act (15 U.S.C. 1601, *et seq.*), the implementing regulation promulgated thereunder (Regulation Z, 12 C.F.R. 226) and the Federal Trade Commission Act (including Section 5 thereof (15 U.S.C. 45)), in the manners found herein.

3. The aforesaid acts and practices of respondent PPSI are not exempt from Federal action by reason of the McCarran-Ferguson Act (15 U.S.C. 1011, *et seq.*); although the acts and practices of respondent PW performed in connection with the sale of insurance in Texas are so exempt.

4. Respondent PW is vicariously liable for the aforesaid acts and practices of respondent PPSI.

5. There is no basis for holding respondent Christopher F. Kempf liable for the aforesaid acts and practices either in his individual capacity or as a named officer of respondent corporations.

6. The aforesaid acts and practices, as herein found, were and are to the prejudice and injury of the public and of respondent PPSI's competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in or affecting commerce within the intent and meaning of the Federal Trade Commission Act. They also constitute violations of the Truth in Lending Act and Regulation Z promulgated thereunder.

7. The proceeding is in the public interest and it is in the public interest that the following order issue. [59]

ORDER

I

It is ordered, That respondents Providence Washington Insurance

[59] Any such McCarran-Ferguson Act exemption, however, would not extend to a third party, not engaged in the business of insurance, which extends credit; nor would such exemption extend to the parent corporation vicariously liable for the activities of the subsidiary finance company under the circumstances here established, regardless of the fact that the parent happens to be an insurance company.

[60] Neither did it appear in the Notice Order accompanying the complaint.

Company and Providence Premium Service, Inc., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collection of, or attempts to collect, accounts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing by any means, directly or by implication, that delinquent accounts have been or will be referred to an independent, third-party attorney or to any attorney for institution of legal action.

2. Representing by any means, directly or by implication, that:

(a) Respondents are prepared to institute, or cause to be instituted, legal proceedings in the collection of delinquent accounts.

(b) Legal action with respect to an allegedly delinquent account has been, or is about [60] to be, or may be initiated.

3. Misrepresenting by any means, directly or by implication, that any delinquent account has been or will be referred to any third party for collection action.

II

It is further ordered, That respondents Providence Washington Insurance Company and Providence Premium Service, Inc., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit, as "consumer credit" is defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. 1601, *et seq.*) do forthwith cease and desist from:

1. Failing to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

2. Failing to disclose the annual percentage rate accurately to the nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

[61] 3. Failing to use the term "cash price" as defined in Section 226.2(i) of Regulation Z, to describe the purchase price of the transaction, as required by Section 226.8(c)(1) of Regulation Z.

4. Failing to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

5. Failing to use the term "unpaid balance of the cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

6. Failing to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

7. Failing to use the term "finance charge" to describe the sum of all charges, as required by Section 226.4 of Regulation Z to be included therein, as required by Section 226.8(c)(8)(i) of Regulation Z.

8. Failing to use the term "total of payments" to describe the sum of the payments scheduled to [62] repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

9. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8) (ii) of Regulation Z.

10. Failing to make all disclosures required by Regulation Z clearly, conspicuously and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

11. Failing in any consumer transaction to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z at the time and in the manner, form and amount required by Sections 226.6, 226.8 and 226.10 of Regulation Z.

Provided, however, that the foregoing provisions of Parts I and II of this order shall not apply to any extension of credit for payment of premiums afforded in connection with the sale of insurance on credit in the State of Texas where the creditor is the seller of the insurance; nor shall they [63] apply to the acts and practices of the seller of insurance in connection with the collection of, or attempts to collect, unpaid balances of premiums for such insurance sold in Texas.

It is further ordered, That the complaint against Christopher F. Kempf in his individual capacity and as a named officer of Providence Washington Insurance Company and Providence Premium Service, Inc. be, and it hereby is, dismissed.

It is further ordered, That respondent corporations deliver a copy of this order to cease and desist to all present and future personnel of respondents now or hereafter engaged in the consummation of any extension of consumer credit, other than an extension of credit in Texas exempted from the foregoing provision of this order, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondent corporations notify the Commission at least thirty (30) days prior to any proposed change in any of the corporate respondents, such as dissolution, assignment or sale resulting in the emergence of any successor corporation or

corporations, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

Opinion of the Commission

May 3, 1977

By Dixon, *Commissioner:*

[1] Complaint in this matter was issued on November 24, 1975, charging respondents Providence Washington Insurance Company (hereinafter referred to sometimes as "PW"), Providence Premium Service, Inc. (hereinafter "PPSI"), and Christopher Kempf, individually and as an officer of said corporations with violations of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and the Truth in Lending Act (15 U.S.C. 1601, *et seq.*), and the implementing regulation promulgated thereunder (Regulation Z, 12 C.F.R. 226). The complaint alleged in particular that PW and PPSI had used deceptive practices in the course of collecting debts, representing that accounts had been referred to an independent, third-party attorney who intended to take legal action, when such was not the case, and that PW and PPSI had violated numerous disclosure requirements of the Truth in Lending Act in the course of financing insurance premiums.

[2] A brief trial was held before Administrative Law Judge (ALJ) Alvin Berman, who entered an initial decision sustaining the bulk of the complaint as to PW and PPSI, while dismissing the individual respondent. Judge Berman held that PPSI, a company engaged solely in the business of financing insurance premiums, had failed to make various required Truth in Lending disclosures and had used deceptive techniques in debt collection . He further held that PPSI was not immunized from liability by the McCarran-Ferguson Act (15 U.S.C. 1011, *et seq.*) because its challenged practices did not constitute the "business of insurance." Providence Washington Insurance Company was held vicariously liable since it owned and controlled the operations of PPSI. The Judge also rejected respondents' contention that the necessity for a remedial order was obviated by the fact that PPSI had discontinued the business of premium financing, and he accordingly recommended entry of an order to cease and desist.

This matter is before the Commission on the appeal of respondents PW and PPSI from the initial decision. In our view the initial decision deals ably with the points in contention and for the reasons indicated hereinafter is sustained, with minor modifications.

I. The McCarran-Ferguson Defense

The centerpiece of respondents' defense is their claim that the challenged practices are shielded from Commission scrutiny by the McCarran-Ferguson Act (hereinafter sometimes MFA). Respondents contend that PPSI's credit extension and debt collection activities are an inseparable adjunct to the "business of insurance," which MFA exempts from federal regulation to the extent that state regulation exists. The ALJ found to the contrary that insurance premium financing is a business of its own, distinct from the business of insurance at least when conducted, as here, by parties other than insurance companies.

The Commission affirms the ALJ's conclusion that insurance premium financing by a premium finance company, and the described practices in particular are not the "business of insurance" within the meaning of the McCarran-Ferguson Act. We do not reach the question of whether the same conduct, if undertaken by an insurance company, would be protected.

[3] A. Factual Background

The facts are largely uncontested. As the law judge observed, PPSI is a wholly-owned and controlled subsidiary of PW, engaged solely in the business of financing insurance premiums (I.D. 1).[1] When a customer of PW seeks to finance an insurance policy, the agent will suggest that PPSI can provide the money. If the customer enters into a financing agreement, it is forwarded for signature to PPSI, which then sends the loan proceeds to the insurance agent who deducts a commission and remits the balance to PW. PW, the insurer, considers the premium paid, and the debtor/policyholder makes required installment payments to PPSI, the lender. (Tr. 158-59; I.D. 2-4).[2] If those payments are not kept current, PPSI notifies the insured that it will effect [4] cancellation of the policy if remittance is not received by a certain date (typically a date within the period paid for by the previous installment). Upon failure to meet this deadline, PPSI, whose contracts confer authority to act as the policyholder's attorney-in-fact, sends a cancellation notice to the insurance company,

[1] The following abbreviations are used herein:
I.D. — Initial Decision, Finding No.
I.D. p. — Initial Decision, Page No.
Tr. — Transcript of Testimony, Page No.
CX — Complaint Counsel's Exhibit No.
RX — Respondents' Exhibit No.

[2] The record indicates that in some instances PPSI also loaned money to pay for policies written by insurance companies outside the Providence Washington Insurance Group. (I.D. p. 10; Gilhooly Affidavit, dated May 11, 1976; RX 12)

with a copy mailed to the erstwhile insured. All unearned premiums are rebated to PPSI with any overage subsequently returned to the policyholder. (I.D. 2b; p. 26).[3]

It appears from the record that PPSI, like other premium finance companies which are subsidiaries of insurance companies was created principally to avoid the effect of state insurance codes which treat the payments due to an insurance company from a policyholder who is paying by installment as "non-admitted" assets. Except in Texas, non-admitted assets may not be counted by the insurer for the purpose of computing its surplus/premiums ratio, which in turn affects the volume of insurance the insurer is allowed to write. (I.D. 1). When the proceeds from a policy are received immediately from a lender, however, they are "admitted," even though the lender may be a wholly-owned subsidiary of the insurer. (Tr. 155-58; I.D. 1).

[5] While it appears that premium finance companies account for a large share of premium financing, other financial institutions have been attracted to this area of consumer credit.[4] As PW's General Counsel observed, "[t]he banks are interested in this business." (Tr. 212, I.D.8). Of the ten states which licensed PPSI, seven regulated it as an insurance premium financer,[5] and three classified it with lenders in general. None placed it in a category with insurance companies. (I.D. 7; p. 14)

B. LEGAL ISSUES

The McCarran-Ferguson Act provides in relevant part that

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That* * *the Federal Trade Commission Act, as amended, shall be applicable to the business

[3] In theory, as one witness observed, insurance premium financing should be a relatively safe business. By making the down payment sufficiently large, timing installments prudently, and canceling the policies of defaulting borrowers promptly, the lender can guarantee that the unearned premium will always exceed the balance due on the loan. (Tr. 159-160; I.D. 4). PPSI's extensive debt collection activities suggest, however, that theory is not always put into practice.

[4] For a related example *see, Cody* v. *Community Loan Corp. of Richmond Cty.*, No. 1863 (S.D. Ga. Feb. 4, 1976) describing a consumer finance company which originated a plan to sell its borrowers cancer insurance and finance the premiums from the proceeds of loans it provided.

[5] Of these, six states assigned insurance premium finance companies to insurance departments and commissioners and one, Massachusetts, supervised them through its Banks and Loans Division (RX 10C-L).

> of insurance to the extent that such business is not regulated by State law. [15 U.S.C. 1012]

[6] A threshold question is whether the activities challenged in this proceeding are part of the "business of insurance" as respondents contend, or the "business of financing" as complaint counsel and the ALJ maintain. If the latter, there can be no immunity; if the former, it must then be determined whether there exists state regulation sufficient to trigger the exemption.

The McCarran-Ferguson Act was passed in response to the Supreme Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944), which raised the spectre of pervasive federal antitrust encroachment upon what had previously been considered a state regulatory preserve, primarily involving insurance ratemaking. Congressional debate centered largely on the relationship between such ratemaking and the antitrust laws, and upon state taxation of insurance companies. *See SEC* v. *National Securities, Inc.*, 393 U.S. 450, 458-459 (1969). The legislative history thus sheds little light upon the present controversy, except perhaps to suggest that a somewhat limited range of activities was within its contemplation when Congress carved out the MFA exemption.

In *SEC* v. *National Securities, Inc., supra,* the Supreme Court sought to define the "business of insurance":

> The relationship between insurer and insured, the type of policy which would be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder* * *. [393 U.S. at 460]

[7] Difficulty arises where, as here, a transaction involves an insurance policy in some arguably incidental fashion, while partaking more substantially of activities of a sort not at all peculiar to insurance, and clearly subject to federal regulatory interests. As courts have recognized:

> *National Securities* indicates that the MFA is to be narrowly construed in the face of valid federal regulatory interests: accommodation of federal and state regulatory interests is to be

sought. [*SEC* v. *Republic National Life Insurance Co.*, 378 F. Supp. 430, 436 (S.D.N.Y. 1974)]

Applying these observations to the instant case, the ALJ concluded that what was principally involved here was the lending of money, and that the federal policy that money lending occur subject to various informative disclosures could not be thwarted by the fact that the money happened to be loaned to enable the borrower to buy an insurance policy. The judge also relied heavily on the fact that PPSI is not an insurer at all, but rather a finance company. [I.D. p. 27]

Respondents urge us to find that because PPSI's financing activities are inextricably intertwined with the insurance transaction it is covered by the MFA exemption, notwithstanding its indisputable characterization as a lender. We agree with respondents that the business of insurance need not necessarily be limited to the operations of insurance companies; and conversely many activities of insurance companies are not the business of insurance. *Compare Ben* v. *General Motors Acceptance Corp.*, 374 F. Supp. 1199, (D. Colo. 1974) with *Battle* v. *Liberty National Life Insurance Co.*, 493 F. 2d 39 (5th Cir. 1974), *cert. denied* 419 U.S. 1110 (1975) and *American Family Life Assurance Co.* v. *Planned Marketing Assoc., Inc.*, 389 F. Supp. 1141 (E.D.Va.1974). By the same token, however, it is clear that the activities of insurance companies are those most likely to involve the insurance business. Where MFA protection is sought for the activities of non-insurers, we think it especially critical that the transaction(s) in question be analyzed with precision, to ensure that the mere involvement of an insurance contract is not used to confer blanket immunity upon a wide range of activities that are not the business of insurance. *Peacock Buick, Inc.*, Dkt. 8976, Order Denying Petition for Reconsideration, March 2, 1976 [87 F.T.C. 379], 3 CCH Trade Reg. Rep. at 21,105 *aff'd*, No. 76-1287, (4th Cir., April 1, 1977).

[8] A central feature of the primary transaction under consideration here is that it does not involve relations between insurer and insured, *e.g.*, discussions concerning the details of a policy which may be issued, or the implementation of one which has been. The only issue in dealing with PPSI is how an insurance policy will be paid for. In soliciting the consumer's business, PW through PPSI is competing not at all with other sources of insurance, but rather with *other sources of money*, be they premium finance companies, banks, small loan companies or credit unions, and its conduct impinges upon competition within the financing industry rather than upon competitive forces within the insurance industry. *See Zelson* v. *Phoenix*

Mutual Life Insurance Co., No. 76-1197, slip op. at 7 (8th Cir. Feb. 4, 1977).

In deciding whether to take a loan from PPSI, the consumer must weigh the cost of that loan against the cost of money obtained from other sources. Nor is the consumer's only alternative a premium loan from a source other than PPSI. Money is money, whatever it may be used to buy. A consumer who doesn't like the terms of PPSI's loan may decide to buy the insurance policy with cash and make some other contemplated purchase on credit, or defer the acquisition of some item more expendable than insurance until credit conditions or the consumer's personal finances improve.

A consumer's ability to entertain the considerations described above depends, of course, upon access to information concerning the true costs of various sources of credit, and it was precisely such access which the Truth in Lending Act was designed to guarantee. 15 U.S.C. 1601; *see Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356 at 363-366 (1973). When a lender fails, as did PPSI on some occasions, to inform consumers of the annual percentage rate at which credit is being extended, (I.D. 37a) it engages in a practice with obvious implications for the business of financing, and one which undermines the federal interest in meaningful disclosure of the costs of credit. 15 U.S.C. 1601.

Similar observations are applicable to PPSI's debt collection activities, whose relationship to the business of insurance is confined to the fact that the purchase of an insurance policy (extinct by the time collection is attempted) has indirectly given rise to the debt. The mailing of dunning notices by a finance company certainly [9] has nothing to do with the relationship between insurer and insured, and indeed, we see nothing to distinguish the collection efforts of PPSI from those of creditors and collection agencies everywhere. *See American Family Life Assurance Co., supra,* at 1145. Once again, this category of activity is one as to which the federal interest in uniform regulation is longstanding.

The preceding discussion, of course, states only one side of the question. In considering this matter respondents have not allowed us to be unmindful of authority to the contrary, in particular the Seventh Circuit's decision in *Lowe* v. *Aarco-American, Inc.*, No. 76-1226 (7th Circuit June 22, 1976) and the district court decision in *Cochran* v. *Paco, Inc.*, 409 F. Supp. 219 (N.D. Ga. 1976). With all due respect, we must decline to follow these cases.[6]

[6] Respondents also cite the cases of *Gerlach* v. *Allstate Insurance Co.*, 338 F. Supp. 642 (S.D. Fla. 1972) discussed *infra*, and *Ben* v. *GMAC*, 374 F. Supp. 1199 (D. Colo. 1974), *Addrisi* v. *Equitable Life Assurance Soc. of the United*

(Continued)

[10] *Lowe* v. *Aarco-American, Inc.*, is a brief *per curiam* opinion. In support of its conclusion the court gave only this rationale:

> Contrary to the appellants' assertion, the "business of insurance" encompasses more than questions of the validity and enforceability of insurance policies or the limits of policy coverages. In a case very similar to the one before us, the statutory term was held to include also the setting of insurance rates and the terms for financing premiums as well as the disclosure of those terms. *Gerlach* v. *Allstate Insurance Co.*, 338 F. Supp. 642, 649-50 (S.D. Fla. 1972). [No. 76-1226, slip op. at 2.]

Our review of the case on which the *Lowe* court so heavily relied indicates that *Gerlach* addressed the question of premium financing only in dictum or at best as an alternative, and not carefully conceived justification for its disposition of the case. In fact the court stated early in its opinion:

> The transaction in this action[7] is not to be confused with the premium financing transaction, where the insured becomes obligated to a broker, bank, the issuing company or other creditor to pay the premium, or an indebtedness for premiums, and is contractually obligated to make payments* * *[338 F. Supp. at 647.] [11] When the court later turned to a discussion of the McCarran-Ferguson Act, it was almost as an afterthought:

> In view of the Court's finding that Allstate is not a "creditor" of plaintiff in a "consumer credit" transaction, a discussion of the McCarran Act and its application would not now be necessary for the determination of this suit. It will be discussed, however, in the event that the appellate court should find, contrary to this Court's holding, that Allstate's plan of installment premium payment is not part of its rate structure but is a "premium

States, 503 F. 2d 725 (9th Cir. 1974), *cert. denied* 420 U.S. 929 (1975), and *Dexter* v. *Equitable Life Assurance Soc. of the United States*, 1975-2 Trade Cases, ¶60,601 (2d Cir. 1975). These latter cases involved the use of tie-ins to coerce the purchase of insurance and are inapposite here.

Sources reaching conclusions contrary to *Lowe* and *Paco* include various Federal Reserve Board letters, [Transfer Binder] (CCH) Consumer Credit Guide ¶¶30,041, 30,051, 30,176; and 30,406, and three commentators, D. Krischer, *"Truth in Insurance Premium Financing*, 30 Bus. Lawyer 969, 974-77 (1975); Comment, *The McCarran Act's Antitrust Exemption for "The Business of Insurance": A Shrinking Umbrella*, 43 Tenn. L. Rev. 329, 359 (1976) and Note, *The McCarran-Ferguson Act: A Time for Procompetitive Reform*, 29 Vand. L. Rev. 1271, 1283 (1976).

[7] The *Gerlach* transaction involved an installment payment plan offered by an insurance company. The court held that because each installment represented an agreement for future coverage which nonpayment and cancellation would prevent from accruing, no extension of credit would occur. This conclusion was bolstered by a finding that Allstate never sought to collect a deficiency from any policyholder whose account it had canceled for nonpayment. 338 F. Supp. at 647.

Such a situation is decidedly not present in the case of PPSI, which extends a loan to cover the entire cost of a policy and takes the contractual position that upon default it may declare the entire balance due and payable. (I.D. p. 11, n. 10; RX 10M). Moreover, PPSI did make efforts to collect deficiencies from defaulting borrowers.

> financing" arrangement, or in the event that the Court of Appeals' holding in *Mourning* v. *Family Publications Service, Inc.*, should be reversed by the Supreme Court.[8] [338 F. Supp. at 649.]

The opinion quoted part of *National Securities*, then noted that the Truth in Lending Act did not "specifically relate" to the business of insurance, and immediately proceeded to its conclusion:

> As the Supreme Court has made clear, the fixing of rates is a part of the "business of insurance." The next question, then, is whether there is state law regulating the fixing of insurance rates. The answer is in the affirmative. [*Id.*]

The court barely entertained the fundamental inquiry, *viz.*, whether the premium installment plan and the gratuitously included premium financing system were in fact aspects of the business of insurance. Instead it conclusively characterized these activities as "ratemaking," which indisputably falls within the exemption. That done, [12] a court could legitimately find state regulation sufficient to displace federal laws[9], but the characterization of financing as ratemaking seems a dubious premise from which to proceed.

We are not alone in doubting the applicability of *Gerlach*. In *Cochran* v. *Paco* itself the court reacted similarly:

> The plaintiff is correct in her assertion that *Gerlach* is not dispositive under the facts here. This case involves the somewhat more subtle question of where the "business of insurance" ends and the business of consumer finance begins. [409 F. Supp. at 221.]

The court in *Lowe* considered one other matter, after having settled to its satisfaction that premium financing was part of the business of insurance. It found that the Illinois Insurance Code had regulated the elements of the insurance business under discussion. But at the very end of the opinion the court added that:

> Since Illinois has regulated this aspect of the "business of insurance" in the same manner as would the Truth in Lending

[8] *Mourning* was *reversed*, 411 U.S. 356 (1973), and *vacated per curiam*, 488 F. 2d 979 (5th Cir. 1974), although, it is not clear whether the point for which it was here cited was explicitly rejected.

[9] One writer thinks the state and federal regulations could have been reconciled so as to avoid the application of the McCarran Act's supersedure mechanism, see Comment, *supra* n. 6, at 350. *See also Cody* v. *Community Loan Corp.*, No. 1863 (S.D. Ga. 1973), and *Jenkins* v. *Triangle Volkswagen*, No. C-74-199-D (M.D.N.C. 1975), cited in *Cochran* v. *Paco, Inc.*, 409 F. Supp. at 223.

> Act, there is no compelling reason to restrict the full sway of the McCarran Act in this case. [No. 76-1226, slip op. at 3.]

In the instant case, of course, not all states in which PPSI did business would provide their citizens the same protections as does the Truth in Lending Act. Under these critically different circumstances we believe the *Lowe* court might and should reach a different result.

[13] The second case advanced by respondents for the proposition that insurance premium financing is part of the business of insurance is the aforementioned *Cochran* v. *Paco*. While we agree with that opinion's rationale to a point, we think the district court overemphasized the premium financer's proximity to the insurance industry and erroneously relied on a state's definition of the business of insurance:

> Notwithstanding their demonstrated similarity to other finance companies subject to the Truth in Lending Act, premium financing companies play an integral part in the insurance transaction and the State of Georgia has therefore required licensing of such companies by the Commissioner of Insurance in a manner similar to the licensing of insurance companies * * *
>
> Thus, although the premium finance company performs much the same role as other finance companies, this role has been recognized by the state as forming an integral part of the insurer-insured relationship. [409 F. Supp. at 222.][10]

[14] On motion to alter or amend decision, the court amplified its theory in reaching the earlier decision. The result, it appears, was based at its core on an "impact" analysis:

> The plaintiff nevertheless seeks to convince the court that a premium financing company cannot be considered a part of the business of insurance because such a company has no control over the terms of an insurance policy, its reliability, or its cost. Rather, plaintiff argues, the company is merely a creditor, indistinguishable from other creditors, except for the fact that it has a power of attorney by which it may cancel the insured's policy.

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[10] It has long been held that the meaning of "business of insurance" as used in the federal McCarran-Ferguson Act is a question of federal, not state law. *SEC* v. *Variable Annuity Life Insurance Co. of America*, 359 U.S. 65, 69 (1959).

In the instant case, moreover, resort to state characterizations for guidance yields little, since some states license premium finance companies through insurance departments while others do so through officials or departments concerned with banking or small loans. (See discussion *supra* at p. 5).

> Plaintiff's argument ignores the realities of the insurance business. Premium finance companies have experienced rapid growth in recent years because of the unwillingness of many insurance companies to sell certain forms of insurance through installment plans. The financing companies fill the gap by paying the insurance company the premiums in full and collecting the premium in installments from the insured. If the insured fails to pay the installments to the financing company, the result is the same as if he defaulted on payments to the insurer: the policy is canceled. Thus, although the finance company's activities have little effect on the insurance company's ability to pay on claims, they have considerable impact on the cost of the insurance, the terms of the policy, and the likelihood of the insured's recovery in accordance with the terms of the policy. This likelihood of recovery may be jeopardized not only by financing disagreements between the financing company and the insured, but also by a possible failure on the part of the financing company to make the required payment to the insurance company. Thus it is clear that the financing company is indeed a part of the business of insurance. (409 F. Supp. at 223)

We think it is far from clear that *all* the activities of the financing company are part of the "business of insurance," simply because one or a few of those activities may cause reverberations in the insurance world. Whatever its relevance, no evidence was presented here, nor cited in *Cochran* v. *Paco,* to support the proposition that premium financing has any measurable effect on the cost of insurance, the terms of the policy, or the likelihood of the policyholder's actual recovery. Only as to the last of these postulated effects does the contribution of premium financing seem to bear even a semblance of demonstrable relationship. As to this, it is hypothesized that because an additional party is introduced into the chain of premium payments, the possibility of disagreement or mistake grows and a policy may be inadvertantly terminated through the power of attorney vested in the finance company.

We do not dispute that the foregoing may occur, (although we have seen no evidence that it does) but we cannot agree that this possibility cloaks the entire operation of PPSI in the protective mantle of McCarran-Ferguson. Just as a small loan company's security interest in an automobile or a bank's deed of trust in a mortgaged house (see I.D. pp. 11-12, 24) does not convert these lenders into participants in the business of car selling or realty, neither does the right to "foreclose" on an insurance policy make an insurer or an insured out of a finance company. At most what it argues is that the

particular act of canceling an insurance policy should be considered the "business of insurance."[11]

[16] In addition to the power of attorney to cancel insurance policies, respondents cite a list of factors which they consider to have an impact upon the business of insurance. (Respondents' appeal brief, at 16-18). We think these proffered features are also unpersuasive as dispositive indicia of the insurance business.[12] As the ALJ observed, "[T]he McCarran-Ferguson Act did not grant broad, general exemptions to businesses which might affect the business of insurance. The exemption was strictly limited to the business of insurance itself." (I.D. p. 23)

[17] For the foregoing reasons we must reject respondents' challenge to the initial decision. In our view, PPSI's activities, extending credit and collecting debts, are best characterized as the "business of finance" and most properly subject to federal regulations pertaining thereto. To be sure, PPSI is something of a hybrid, since its operations do bear some relationship to the business of insurance, and at least one small facet of those operations (the power of attorney to cancel a policy) might be deemed to involve the relationship between insurer and insured. Nevertheless, we do not think that this thread of insurance can be woven into a blanket exemption for the entire scope of a financing company's operations. Broad exemptions from the antitrust laws and from major consumer protection legislation ought not be conferred lightly, cf. *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348 (1963), and we do not believe that Congress meant to do so when it enacted the McCarran-Ferguson Act.

To accept respondents' position here is to exempt a large segment of the *credit market* from the uniform protections against deceptive and unrevealing credit practices which Congress intended to bestow when it passed the Truth in Lending Act. This, we think, would serve only to thwart a legitimate federal regulatory interest, while doing nothing to further MFA's goal of federal non-interference with state-

[11] We note in this regard, however, that the activities of many non-insurers may "impact" upon the insured's receipt of policy benefits. For example, the negligence of a bank which offers automatic bill payment services but fails to pay the insurer may lead to policy cancellation as surely as the negligence of the premium financer.

[12] All of these purported "impacts" strike us as either inconsequential or of such character that to accept them as relevant would propel the MFA exemption deep into noninsurance aspects of the economy. Thus, (1) insurance premium financing facilitates the insurer-insured relationship (but so would any financing mechanism); (2) financing may affect the payment of the agent's commission which relates to ratemaking (but very nebulously indeed); (3) since the insured pays "premiums" in installments to a finance company and the payment of premiums is an element of the business of insurance, such payments are part of the business of insurance (however, the payments to the finance company are just that, installment payments on a consummated loan, not premiums). Other supposed impacts are restatements of the law (3b, 4b, 8b) or else relate to the power of attorney already discussed (3a-b, 4a-b, 5a-b).

regulated dealings between insurer and insured concerning the insurance policy.[13] Accordingly, we hold that the credit extension and debt collection activities of an insurance premium finance company are not the "business of insurance" within the meaning of the McCarran-Ferguson Act, and are, therefore, properly subject to the requirements of the Truth in Lending Act and Section 5 of the Federal Trade Commission Act.

[18] In reaching our conclusion we express no view as to whether practices similar to those involved here would be exempt if engaged in by the insurer itself. The ALJ concluded that they would be protected, but the issue was not squarely raised by the litigants on appeal, there is no need to resolve it,[14] and we have not adopted as part of our decision the ALJ's remarks at I.D. pp. 27-28 pertaining thereto. To be sure, an analysis that looks to substance over form might suggest that insurer and premium financer should be treated identically, and observation that respondents have made in support of *their* position, but one that we think argues more strongly for Truth in Lending application to insurers. On the other hand, there may be differences between the premium installments paid to an insurer directly and premium financing [see the discussion of *Gerlach* at pp. 10ff, *supra;* cf. FRB Opinoin Letter No. 262 (1970)] that warrant different treatment. Moreover, in a close case of statutory construction involving an exemption from the law, questions of form are perhaps not irrelevant. As the ALJ noted, PW created PPSI precisely in order to escape the effect of certain provisions of state insurance codes defining admitted assets. It would not offend our sense of fairness to discover that in so doing it had also escaped the effect of federal law exempting its insurance activities from federal regulation. [19]

II. Other Defenses—Discontinuance

Respondents contend that no order is necessary because PPSI has discontinued the business of financing insurance premiums, and gives no indication of resuming it. On this point we agree with the findings and conclusions of the ALJ at I.D. 59-61. PPSI continues to

[13] Respondents have not suggested what state policies pertinent to the business of insurance would be jeopardized by application of Truth in Lending to credit extensions by premium finance companies, which is consistent with their alternative defense that all violations of Truth in Lending on their part were eliminated by summer, 1973 (*infra* at p. 19). Having made this observation we hasten to note our recognition that the question of whether PPSI's activities are the "business of insurance" is one which precedes and is distinct from the question of whether state regulation exists and if it exists whether it clashes with federal law. What all this does suggest, however, is just how far afield respondents' position carries the MFA exemption from the situation which gave rise to it, *i.e.*, federal interference with regulatory functions traditionally reserved to the states.

[14] The ALJ properly found that PW was vicariously liable *for the acts of PPSI, which it controlled.* His proposed proviso to paragraphs I and II of the order, which we adopt, would ensure that the order applies to PPSI only when it acts through a financing subsidiary.

exist and there is no reason to conclude that the same factors that once make it seem desirable for PW to maintain a financing subsidiary will not recur.

Respondents also argue that no order as to Truth in Lending matters is needed because they had discontinued their violations before the "long arm" of the law fastened upon their shoulders. Respondents began to use an amended form of disclosure, RX 2, in June, 1973, and preparation of similar forms for other states was underway in July or August, 1973, when respondents were first made aware of the Commission's investigation. Thus, respondents contend, they had essentially ceased their violations without urging from the government. Respondents further note that the exhibits introduced by complaint counsel demonstrating violations all relate to the period prior to the time respondents were contacted by Commission representatives.

We reject this argument for several reasons. As the ALJ found, at least one violation did continue well beyond the commencement of the Commission's investigation, *i.e.*, failure to list "unpaid balance of cash price" in the disclosures (I.D. 37e; pp. 54-55). Moreover, respondents' answer to the complaint acknowledged that "certain agreements and forms of agreements used by PPSI employees between July 1, 1969 and October 1, 1974 were deficient under Regulation Z." (Answer, p. 3, ¶11.1) Respondents contend that this statement was meant only to admit violations during some unspecified portion of the 1969-1974 period, and not necessarily during the latter part of it. However, the complaint itself alleged simply violations "subsequent to July 1, 1969," and respondents' answer did not aver that all Truth in Lending violations were stopped by July, 1973. Instead, the only discontinuance defense raised as to Truth in Lending was the claim that PPSI had ceased premium financing on October 1, 1974.

[20] If it was respondents' position that all Truth in Lending violations had ceased as of summer, 1973, they chose an odd way to make the point by responding to a charge that violations occurred "subsequent to July 1, 1969" with an answer admitting only that "certain agreements and forms of agreements used by PPSI employees between July 1, 1969 and October 1, 1974 were deficient under Regulation Z." We cannot and do not believe that the same counsel who have briefed and argued with such commendable clarity before this Commission could have pleaded so ineptly before the Administrative Law Judge. In our view the fairest reading of respondents' answer is that it did concede violations throughout the period of July 1, 1969, through September, 1974, and that complaint counsel were

not obliged to introduce evidence from every portion of this period in light of the admission.[15]

Even were we to assume, *arguendo,* that respondents were in the process of halting all but one minor Truth in Lending violation at the time Commission investigators first contacted them, the undisputed fact remains that for a period of at least four years following the effective date of Truth in Lending, numerous significant violations of the law occurred, including nondisclosure of the annual percentage rate and the use of improper terminology and forms. (I.D. 37) [21] Respondents' alleged discontinuance prior to Commission intervention would perhaps argue in their favor that no order is needed[16] but the persistence of serious violations for at least four years prior thereto argues more persuasively that an order is appropriate to ensure there is no relapse into old ways.

III. Debt Collection Practices

The Administrative Law Judge found that respondents represented that they intended to take legal action against allegedly delinquent debtors when, in fact, it was not their practice to take such action against debtors who did not pay in response to the threat. The ALJ held that such practice was deceptive and unfair and we affirm that holding. (I.D. 16-32; respondents have not appealed from it.)

The Administrative Law Judge further found that respondents represented that one of their own employees was, in fact, an independent outside third-party collection attorney. The ALJ held that this practice was deceptive and unfair and we similarly affirm that holding. (I.D. 16-32; respondents do not dispute that the stated practice is deceptive, but appear to deny having engaged in it, *infra* at p. 22.)

[22] Respondents protest that the ALJ's order with respect to debt collection practices goes too far in several respects. First, it is alleged that the order flatly prohibits "representing" that accounts have been referred to a collection attorney and that legal action is contemplated. Respondents contend that the order should simply prohibit "misrepresenting" these matters. This point is well-taken,

[15] Theoretically complaint counsel needn't have introduced any evidence at all to prove Truth in Lending violations in light of respondents' admission, but the evidence actually introduced does permit analysis of the character of the violations.

[16] Some cases rejecting discontinuance as grounds for omission of an order have cited the offender's awareness of governmental interest as one reason to doubt that subsequent discontinuance obviated the need for relief, *e.g., Fedders* v. *FTC,* 529 F. 2d 1398 (2d Cir.), *cert. denied,* 45 U.S.L.W. 3244 (October 5, 1976). No case, however, of which we are aware, has held that discontinuance prior to contact by the government is necessarily reason for omitting an order, nor would such a holding make any sense. The point in time at which discontinuance occurs is obviously but one consideration bearing on the necessity for an order. See *Fedders, supra* which lists other considerations, *e.g.,* the length of time for which violations have persisted and their seriousness. (529 F. 2d at 1403)

and we have made the requested modification. We would note, however, that "contemplating legal action" is more than merely a state of the creditor's mind. Where legal action is threatened, but not taken in the face of nonpayment, it can be no defense to a charge of misrepresentation to contend that such action was nevertheless "contemplated" or "intended."

Respondents also maintain that the order should include no prohibition upon misrepresenting that an account has been referred to an independent, third-party attorney. Such a misrepresentation was clearly made by respondents, whose in-house attorney avoided PW or PPSI stationery and received incoming calls on a private line which did not go through the PW or PPSI switchboard. The materiality of the misrepresentation is most readily apparent from the pains which respondents took to perpetuate it. Many debtors may have no legal defense or justification for their arrears, but others do, and all are entitled to be dealt with honestly. Reference to a third party attorney may imply to the debtor an increased possibility of legal action. Certainly where the debtor has a possible defense it is most unfair for the creditor to *misrepresent* the likelihood that the matter will end up in court. For ease of compliance we note that respondents can avoid prior misrepresentations simply by ensuring that in-house collection letters are written, like other communications, on stationery emblazoned with the company name.

Finally, respondents object to a prohibition upon misrepresentations that matters have been or will be referred to an independent third-party collection agency. While this precise misrepresentation was not used by respondents, it is very similar to the deceptive claim which was made and we think it was properly included as fencing in. *FTC* v. *Mandel Bros. Inc.*, 359 U.S. 385, 393 (1959); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611 (1946); *Fedders* v. *FTC*, *supra*.

In all other respects the decision of the ALJ is affirmed. An appropriate order is appended.

Final Order

This matter having been heard by the Commission upon the appeal of respondents' counsel from the initial decision and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying Opinion, having substantially denied the appeal, while granting it in minor part:

It is ordered, That pages 1-58 of the initial decision of the administrative law judge be, and they hereby are, adopted as the Findings of Fact and Conclusions of Law of the Commission, with the

following exceptions: p. 27, final two paragraphs; p. 28, first four paragraphs.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

ORDER

I

It is ordered, That respondents Providence Washington Insurance Company and Providence Premium Service, Inc., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collection of, or attempts to collect, accounts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Misrepresenting by any means, directly or by implication, that delinquent accounts have been or will be referred to an independent, third-party attorney or to any attorney for institution of legal action.

2. Misrepresenting by any means, directly or by implication, that:

(a) Respondents are prepared to institute, or cause to be instituted, legal proceedings in the collection of delinquent accounts.

(b) Legal action with respect to an allegedly delinquent account has been, or is about to be, or may be initiated.

3. Misrepresenting by any means, directly or by implication that any delinquent account has been or will be referred to any third party for collection action.

II

It is further ordered, That respondents Providence Washington Insurance Company and Providence Premium Service, Inc., corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit, as "consumer credit" is defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. 1601, *et seq.*) do forthwith cease and desist from:

1. Failing to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b) (2) of Regulation Z.

2. Failing to disclose the annual percentage rate accurately to the

nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

3. Failing to use the term "cash price" as defined in Section 226.2(i) of Regulation Z, to describe the purchase price of the transaction, as required by Section 226.8(c)(1) of Regulation Z.

4. Failing to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

5. Failing to use the term "unpaid balance of the cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

6. Failing to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

7. Failing to use the term "finance charge" to describe the sum of all charges, as required by Section 226.4 of Regulation Z to be included therein, as required by Section 226.8(c)(8)(i) of Regulation Z.

8. Failing to use the term "total of payments" to describe the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

9. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price", as required by Section 226.8(c)(8)(ii) of Regulation Z.

10. Failing to make all disclosures required by Regulation Z clearly, conspicuously and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

11. Failing in any consumer transaction to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z at the time and in the manner, form and amount required by Sections 226.6, 226.8 and 226.10 of Regulation Z.

Provided, however, that the foregoing provisions of Parts I and II of this order shall not apply to any extension of credit for payment of premiums afforded in connection with the sale of insurance on credit in the State of Texas where the creditor is the seller of the insurance; nor shall they apply to the acts and practices of the seller of insurance in connection with the collection of, or attempts to collect, unpaid balances of premiums for such insurance sold in Texas.

It is further ordered, That the complaint against Christopher F. Kempf in his individual capacity and as a named officer of Providence Washington Insurance Company and Providence Premium Service, Inc. be, and it hereby is, dismissed.

It is further ordered, That respondent corporations deliver a copy of this order to cease and desist to all present and future personnel of respondents now or hereafter engaged in the consummation of any extension of consumer credit, other than an extension of credit in Texas exempted from the foregoing provision of this order, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondent corporations notify the Commission at least thirty (30) days prior to any proposed change in any of the corporate respondents, such as dissolution, assignment or sale resulting in the emergence of any successor corporation or corporations, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent corporations or their successors and assigns shall, within sixty (60) days of the effective date of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the provisions of this order.

Chairman Pertschuk did not participate.

IN THE MATTER OF

HALLCRAFT JEWELERS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket 9086. Complaint, July 20, 1976—Decision, May 9, 1977

This consent order, among other things, requires a Levittown, Pa., retailer of watches and jewelry, and its subsidiaries to cease misrepresenting an affiliation with the Government or the Armed Forces; the quality and prices of their merchandise; and their business methods and services. Respondents are required to advise customers of cancellation and refund rights; furnish Spanish translations of pertinent documents, where applicable; and, in connection with consumer credit, cease failing to disclose such information as is required by Regulation Z of the Truth in Lending Act. Further, respondents, in the collection of debts, are prohibited from threatening fictitious disciplinary action, or otherwise engaging in the acts and practices proscribed in the order.

Appearances

For the Commission: *Michael Dershowitz.*

For the respondents: *Richard A. Bookspany, Stark & Stark,* Trenton, N.J.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Hallcraft Jewelers, Inc., a corporation, Hallcraft Jewelers, Inc. of New Jersey, a corporation, Crest Clothiers, Inc., a corporation, also trading and doing business as Crest Collection Agency, and Donald J. Bound, individually and as an officer of said corporations, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Hallcraft Jewelers, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania. It dominates and controls the acts and practices of its wholly-owned subsidiaries

Hallcraft Jewelers, Inc. of New Jersey and Crest Clothiers, Inc., which are corporations organized and doing business under and by virtue of the laws of the State of New Jersey. Respondent Crest Clothiers, Inc., also trades and does business as Crest Collection Agency. All of the above-named corporate respondents have their principal offices and places of business at 7022 Bristol Pike, Levittown, Pennsylvania.

Respondent Donald J. Bound is an officer of each of the corporate respondents named herein. He formulates, directs and controls the acts and practices of said corporate respondents including the acts and practices hereinafter set forth. His address is the same as that of said corporations.

The aforementioned respondents (hereinafter sometimes collectively referred to as Hallcraft Jewelers) cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been engaged in the manufacture of jewelry and the advertising, offering for sale, sale and distribution of jewelry and watches, as well as the collection of accounts resulting from the retail sale of such merchandise from various retail outlets located throughout the United States and adjacent to military bases.

PAR. 3. In the course and conduct of their aforesaid business, respondents are now, and for some time last past have been, engaged in shipping merchandise for retail sale from their principal place of business in the Commonwealth of Pennsylvania to various retail outlets located throughout the United States. Respondents also ship merchandise directly from their principal place of business to persons located throughout the United States and the District of Columbia, through the facilities of the United States Postal Service. Respondents also use the same facilities to mail collection forms and letters from their principal place of business to alleged debtors located throughout the United States and the District of Columbia and in various foreign countries.

Accordingly, respondents have maintained, and now maintain, a substantial course and conduct of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two and Three hereof are incorporated by reference in COUNT I as if fully set forth verbatim.

PAR. 4. In the course and conduct of their aforesaid business, and

for the purpose of inducing the purchase of their products and services, respondents and their employees, salesmen, representatives, licensees, franchisees or contractors have represented and now represent, directly or by implication in oral solicitations to prospective customers that:

1. Hallcraft Jewelers is affiliated with or has some official relationship with the United States Government or the United States Armed Forces.

In order to enhance the above representation, respondents have made or make the following typical and illustrative, but not all-inclusive additional oral representations:

(a) Hallcraft Jewelers does not have to charge state sales tax with the sale of its merchandise.

(b) Hallcraft Jewelers can offer low prices for its merchandise because it is affiliated with Military Post Exchanges.

(c) Hallcraft Jewelers is the exclusive jewelry dealer for military personnel.

(d) Hallcraft Jewelers merchandise is either inspected or approved by military personnel.

(e) Hallcraft Jewelers registers the diamonds it offers for sale with the United States Government.

2. Upon payment and fulfillment of a debt to Hallcraft Jewelers purchasers are promised or may receive an "AAA credit rating," as evidenced by a printed card to that effect, which enables purchasers to then purchase merchandise on credit from merchants other than Hallcraft Jewelers.

PAR. 5. In truth and in fact:

1. Hallcraft Jewelers is not affiliated with, nor has any official relationship with the United States Government or the United States Armed Forces.

(a) Hallcraft Jewelers may not have to charge state sales tax with the purchase of its merchandise, not because it is affiliated with or has some official relationship with the United States Government or the United States Armed Forces, but rather because Hallcraft Jewelers may not have a store in the state in which its merchandise is being mailed.

(b) Hallcraft Jewelers is not affiliated with Military Post Exchanges and cannot for that reason offer lower prices for its merchandise. In fact, Hallcraft Jewelers charges higher prices for its merchanidse than Military Post Exchanges do for the same or similar merchanidse.

(c) Hallcraft Jewelers is not the exclusive jewelry dealer for military personnel.

(d) Hallcraft Jewelers merchandise is neither officially inspected nor approved by military personnel.

(e) Hallcraft Jewelers does not register the diamonds it offers for sale with the United States Government.

2. The "AAA credit rating" that purchasers of Hallcraft Jewelers merchanidse are promised or may receive, will rarely, if ever, in and of itself enable purchasers to buy merchandise on credit from merchants other than Hallcraft Jewelers. In fact, the promise or granting of such ratings only constitutes a further attempt by respondents to falsely induce the purchase of their merchandise.

Therefore, the statements and representations as set forth in Paragraph Four hereof were and are false, misleading and deceptive.

PAR. 6. In the further course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their products and services, respondents have made and are now making, numerous statements and representations in various printed materials which respondents present to prospective or actual purchasers.

Typical and illustrative of said statements and representations, but not all-inclusive thereof, are the following:

> We use only the finest diamonds available.
>
> To insure quality and avoid substitution of inferior gems, we certify that every diamond in your merchandise has been carefully examined under a 30-POWER DIAMOND LOUPE before mounting to guarantee brilliance, color, cut and clarity.
>
> * * * * * * *
>
> Hallcraft operates under a "military code of business ethics,"* * *[which provides that]
>
> We will make no misrepresentations to customers regarding our business or services.
>
> We will conceal no material fact, either directly or indirectly, which could cause a customer to be misled as to quality of merchandise, nature of service or terms of sale.
>
> We will avoid any practice which might place this business under investigation by the Armed Forces Disciplinary Control Board, realizing that this Board has the duty to place any establishment which it finds engaged in unfair, immoral or illegal practices, off limits to military personnel.
>
> * * * * * * *
>
> No unjustified, insulting or ridiculous letters of indebtedness are ever sent to customers or their commanding officers. Many a promising military career has been ruined by unscrupulous merchants, who have written letters to commanding officers on unjustified debts.

PAR. 7. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, respondents have represented, and are now representing, directly or by implication, that:

1. Respondents sell only the finest diamonds available.

2. Respondents examine every diamond they sell under a 30-power diamond loupe before mounting which enables them to guarantee the brilliance, color, cut and clarity of diamonds sold.

3. Because respondents operate under a military code of business ethics, they are affiliated with or have some official relationship with the United States Armed Forces.

4. Because respondents operate under a military code of business ethics, it is unlikely that respondents will make any misrepresentations to customers regarding their business or services.

5. Because respondents operate under a military code of business ethics, it is unlikely that respondents will conceal material facts, either directly or indirectly, which could cause a customer to be misled as to quality of merchandise, nature of service or terms of sale.

6. Because respondents operate under a military code of business ethics, it is unlikely that respondents will engage in any practice which might place them under investigation by the Armed Forces Displinary Control Board, realizing that this Board has the duty to place any establishment which it finds engaged in unfair, immoral or illegal practices, off limits to military personnel.

7. Because of the serious consequences involved with sending letters of indebtedness to customers and their commanding officers, respondents will refrain from doing so, at least in the ordinary course and conduct of their business.

PAR. 8. In truth and in fact:

1. Respondents do not sell the finest diamonds available; in many instances, they sell a much lower quality grade of diamonds.

2. Examination of diamonds before mounting by respondents, under a 30-power diamond loupe, will not guarantee the brilliance, color, cut or clarity of diamonds. In fact, 30-power loupes are not ordinarily used in the industry for diamond examination.

3. Respondents are not affiliated with nor have any official relationship with the United States Armed Forces, and their use of the word "military" in conjunction with a code of business ethics is a misrepresentation of respondents' status or affiliations.

4. In disregard of their alleged adherence to a military code of business ethics, respondents have and are making numerous misrepresentations to customers regarding their business or services.

5. In disregard of their alleged adherence to a military code of

ethics, respondents have and are concealing material facts, either directly or indirectly, which cause customers to be misled as to quality of merchandise, nature of service or terms of sale.

6. In disregard of their alleged adherence to a military code of business ethics, respondents have engaged and are engaged in practices which have resulted in their being placed under investigation by the Armed Forces Disciplinary Control Board and in fact, the Board has exercised its duty to place respondents' place of business in various locations off limits to military personnel after finding that respondents engaged in unfair, immoral, or illegal practices.

7. Respondents have not refrained from sending numerous letters of indebtedness to customers and their commanding officers and in fact, respondents have and are sending numerous such letters to other third parties as well, in the ordinary course and conduct of their business.

Therefore, the statements and representations as set forth in Paragraphs Six and Seven hereof were and are false, misleading and deceptive.

PAR. 9. In the further course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their products and services, respondents and their employees, salemen, representatives, licensees, franchisees or contractors have engaged and are engaged in the following unfair, false, misleading and deceptive acts and practices:

By and through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four, Six and Seven, above, and through the use of high pressure sales methods predicated upon a child's love for his parents or some other loved one, respondents or their representatives have been able to induce customers into signing a contract upon initial contact without giving the customer sufficient time to carefully consider the purchase and consequences thereof.

PAR. 10. In the course and conduct of their aforesaid business, and in furtherance of a program for inducing the payment of alleged delinquent accounts by purchasers of jewelry and watches, pursuant to contracts with Hallcraft Jewelers, respondents have made, and are now making, numerous statements and representations in printed forms and letters and other printed material which respondents mail, or cause to be mailed, to alleged delinquent debtors.

Typical and illustrative of said statements and representations, but not all-inclusive thereof, are the following:

1. Statements and representations on the inside of Hallcraft Jewelers series of dunning envelopes:

A letter to your Commanding Officer will be written if you ignore this letter.

Re LEGAL PROCEEDINGS

* * * * * * *

* * *our attorneys are now in the process of enforcing said Articles.

* * * * * * *

Such proceedings and legal fees can be stopped only by a remittance of at least $40. within 10 days,* * *.

Should you fail to remit or reply, your will force us to turn your account over to THE CREST COLLECTION AGENCY without further notice to you.

2. Statements and representations on forms and letters with the letterhead "Hallcraft Jewelers, Inc.:"

Be advised, due to the serious delinquent condition of your account, it has now been transferred to the legal department.

Should you decide not to cooperate, to bring about liquidation of your account, litigation by this department will be initiated and all legal avenues available to us will be used.

Seymour Cohen,
Legal Department

The second copy [of a complete report of our efforts to attain liquidation of the balance] will be delivered to the local credit bureau's (sic) of all concerned.

[A third letter] will be sent to the Adjutant General, Washington, D.C. If sent, there is no doubt, disciplinary action will result.

Be advised, litigation against the above named individual and yourself has been initiated.

If it becomes necessary to take action to either collect the amount past due on your account, or to repossess our merchandise through the civil courts, please be advised that all court costs and attorney fees will be paid by you, as stated in terms of the Conditional Sales Contract, signed by you at the time of purchase.

3. Statements and representations on forms and letters with the letterhead "Crest Collection Agency, P.O. Box 185, Burlington, New Jersey 18016:"

Your delinquent account with the above named company has been transferred to the Crest Collection Agency for collection purposes.

To avoid the embarrassment of having a credit investigation conducted in your local area, plus the possibility of having a collection agent coming to your home, we again implore you to lend us your cooperation.

* * *To protect ourselves and our affiliates we do hereby notify you that after ten

(10) days from date hereof we disclaim all liability of the part of ourselves and our affiliates for any loss of position, injury to prestige, credit standing, reputation or influence, or any other damage caused you by the just and fair prosecution of this claim to a full and complete settlement thereof.

In boldface type headings, sometimes in Latin:

PEREMPTORY NOTICE

DISCLAIMER OF LIABILITY

DRAFT DEPOSITION NOTA BENE

Along with a masthead insignia which depicts an eagle, a stars and stripes shield and the scales of justice.

PAR. 11. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, respondents have represented, and are now representing, directly or by implication, that:

1. If payment is not made, respondents will notify the debtor's superior officers and disciplinary action will result.

2. If payment is not made, respondents will initiate legal proceedings against the debtor.

3. Because payment had not been made, respondents have initiated legal proceedings against the debtor.

4. If payment is not received within the time specified by respondents, some immediate action will be taken by respondents to collect a debt, such as notification of superior officers or turning over accounts to a collection agency.

5. Respondents maintain a legal department.

6. If respondents seek to collect a debt or repossess their merchandise through the civil courts, the Conditional Sales Contract between respondents and debtor provides that the debtor pay all court costs and attorneys fees.

7. If payment is not made, the debtor's account will be turned over to an independent collection agency retained by respondents to collect respondents' delinquent accounts.

8. If payment is not made, the debtor's account will be turned over to a local credit bureau and the local credit bureaus of his relatives, references and recipients of the purchased merchandise.

9. If payment is not made, respondents will cause a credit investigation to be conducted in the debtor's local area with the possibility that a collection agent will call at his home.

10. Respondents can validly disclaim all liability for the possible consequences of their actions taken against the debtor, including his

loss of position, injury to prestige, credit standing, reputation or influence, or any other damages caused the debtor.

11. Respondents' communications to debtors constitute legal process forms.

PAR. 12. In truth and in fact:

1. Notification of the debtor's superior officers by respondents will rarely, if ever, result in disciplinary action taken against the debtor.

2. Respondents rarely initiate legal proceedings against debtors.

3. Respondents do not take immediate action to collect debts if payment is not received within the time specified; only further threatening forms and letters are sent to debtors.

4. Respondents do not maintain a legal department.

5. When respondents attempt to collect a debt or repossess their merchandise through the civil courts, the Conditional Sales Contract between respondents and debtor does not provide that the debtor pay all court costs and attorneys fees, but in fact, provides that the debtor pay attorneys fees in an amount not exceeding 10 percent of the balance due on a debt.

6. Debtors' accounts are not turned over to an independent collection agency, but are rather turned over to the Crest Collection Agency, a component of the single business entity operated as an integrated operation by respondent Donald J. Bound; and its different mailing address from Hallcraft Jewelers, Inc. is a further misrepresentation of respondents' actual business organization.

7. Debtors' accounts are rarely, if ever, turned over to a local credit bureau and are never turned over to the local credit bureaus of relatives, references or recipients of the purchased merchandise.

8. Respondents rarely, if ever, cause a credit investigation to be conducted in the debtor's local area with a collection agent calling at his home.

9. Respondents cannot validly disclaim all liability for the possible consequences of their actions against debtors; debtors have the right to a trial to establish any damages possibly suffered by them. Respondents make this claim only to impliedly threaten debtors with the very possibilities described, in order to further harass and intimidate them.

10. Respondents' communications to debtors do not constitute legal process forms.

Therefore, the statements and representations as set forth in Paragraphs Ten and Eleven hereof were and are false, misleading and deceptive.

PAR. 13. In the further course and conduct of their aforesaid

business, and in furtherance of a program for inducing the payment of alleged delinquent accounts by purchasers of jewelry and watches, pursuant to contracts with Hallcraft Jewelers, Inc., respondents have engaged, and are now engaging in the act and practice of communicating with various third parties concerning the alleged indebtedness. By such communication, respondents have also demanded and are now demanding of such third parties, either directly or by implication, that full or partial payment be made by them to liquidate the alleged indebtedness. Respondents have contacted, and are now contacting, members of the United States Armed Forces, debtors' relatives, references and recipients of purchased merchandise.

Typical and illustrative of such contact and statements and representations found therein, but not all-inclusive thereof, are the following:

1. On forms and letters with the letterhead "Hallcraft Jewelers, Inc." and "Crest Collection Agency" sent to members of the United States Armed Forces:

> In the interest of settling the delinquent account of the above named individual, we respectfully request your assistance.
>
> In reference to the above-named individual, we are asking that a member of your staff counsel this man with regard to his obligation to this company.
>
> It would be appreciated if the subject could be counseled with regard to the advantages of voluntary repossession of purchased item(s), and obtain from him, his statement of release.
>
> We are familiar with Military Regulations concerning an individual's responsibility to creditors and equally familiar with the limits you have as a Commander in such matters. Therefore, we are not asking you to act as a collection agent, but rather, as an intermediary between Crest Collection Agency and the debtor.

2. On the inside of Hallcraft Jewelers dunning envelopes and on forms and letters with the letterhead "Crest Collection Agency" sent to debtors:

> Copy Sent to Legal Home Address and Holder of Merchandise.

3. On the inside of Hallcraft Jewelers, Inc. dunning envelopes and on forms and letters with the letterhead "Hallcraft Jewelers, Inc." sent to the recipients of merchandise and a debtor's legal home address:

> This serious action and embarrassment can be stopped only by the immediate receipt of $40.

Such proceedings and legal fees can be stopped only by a remittance of at least $40. within 10 days* * *

* * *we have found it necessary to send the first letter of indebtedness to the above-mentioned individual's Commanding Officer. Please do not underestimate this action for it can cause serious consequences with regards to his Military records* * *

If you wish to interdict this action in the interest of assisting the above individual, please remit at least $40. before the 20th of this month, along with arrangements to liquidate the remaining balance.

The second copy [of a complete report of our efforts to attain liquidation of the balance] will be delivered to the local credit bureau's (sic) of all concerned.

Be advised, litigation against the above-named individual and yourself has now been initiated. You have been named as the holder of merchandise still encumbered by this company and subsequently will be named as the co-defendant in legal proceedings now being prepared.

PAR. 14. The aforesaid acts and practices of respondents as described in Paragraph Thirteen hereof has had, and now has, the capacity and tendency to cause alleged delinquent debtors and various third parties contacted by respondents to feel coerced, pressured and embarrassed, their private affairs to be interfered with and their integrity to be undermined. Therefore, the use by respondents of such acts and practices is, and was, unfair.

PAR. 15. The use by respondents of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true, and into the payment of alleged debts by reason of said erroneous and mistaken belief.

PAR. 16. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of products and services of the same general kind and nature as those sold by the respondents.

PAR. 17. The aforesaid acts and practices of the respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce

and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT II

Alleging violations of the Truth in Lending Act and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, and Three hereof are incorporated by reference in COUNT II as if fully set forth verbatim.

PAR. 18. In the course and conduct of their aforesaid business, respondents regularly extend, and for some time past have regularly extended, consumer credit as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 19. Subsequent to July 1, 1969, respondents, in the course and conduct of their aforesaid business, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, have caused and are causing customers to execute binding conditional sales contracts, hereinafter referred to as the "Contract." Respondents do not provide these customers with any other consumer credit cost disclosures.

By and through the use of the Contract, respondents:

1. Fail to use the term "cash price" as defined in Section 226.2(i) of Regulation Z, to describe the purchase price of the merchandise or service, as required by Section 226.8(c)(1) of Regulation Z.

2. Fail to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

3. Fail to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

4. Fail to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

5. Fail to use the term "deferred payment price" to describe the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, as required by Section 226.8(c)(8)(ii) of Regulation Z.

6. Fail to use the term "total of payments" to describe the sum of the payments scheduled to repay the indebtedness, as required by Section 8(b)(3) of Regulation Z.

7. Fail to properly disclose the amount, or method of computing

the amount, of a delinquency charge payable in the event of late payments, as required by Section 226.8(b)(4) of Regulation Z.

8. Fail to make all required disclosures together on either the note or other instrument evidencing the obligation on the same side of the page and above or adjacent to the place for the customer's signature, or on one side of a separate statement which identifies the transaction, as required by Section 226.8(a) of Regulation Z.

PAR. 20. Subsequent to July 1, 1969, respondents have caused to be disseminated through the mail, advertisements, as "advertisement" is defined in Section 226.2(b) of Regulation Z, to aid, promote, or assist directly or indirectly consumer credit sales of merchandise of various types.

By and through the use of the advertisement, respondents disclose one or more of the credit terms listed in Section 226.10(d)(2) of Regulation Z without also clearly and conspicuously disclosing the additional credit terms required by and set forth in paragraphs (i) through (v) of Section 226.10(d)(2) in terminology prescribed under Section 226.8 of Regulation Z.

PAR. 21. Subsequent to October 28, 1974, respondents have caused to be disseminated through the mail, advertisements, as "advertisement" is defined in Section 226.2(b) of Regulation Z, to aid, promote or assist directly or indirectly consumer credit sales of merchandise of various types. These consumer credit sales were repayable in more than four installments without the imposition of a separately stated finance charge. Certain of these advertisements have failed to state clearly and conspicuously, as required by Section 146 of the Truth in Lending Act and Section 226.10(f) of Regulation Z, the disclosure: "THE COST OF CREDIT IS INCLUDED IN THE PRICE QUOTED FOR THE GOODS AND SERVICES."

PAR. 22. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act, and pursuant to Section 108(c) of the Truth in Lending Act, respondents have thereby engaged in unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having heretofore issued its complaint charging the respondents named in the caption hereto with violation of Section 5 of the Federal Trade Commission Act, as amended, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the respondents having

been served with a copy of the complaint together with a proposed form of order; and

The Commission having duly determined upon a joint motion of Commission counsel and respondents' counsel that, by the circumstances presented, the public interest would be served by withdrawal of the matter from adjudication for the purpose of considering a proposed agreement containing a consent order pursuant to Section 3.25 of the Commission's Rules; and

The respondent and counsel for the Commission having executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having accepted same, and the agreement containing a consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedures prescribed in Section 3.25(d) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Hallcraft Jewelers, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 7022 Bristol Pike, Levittown, Pennsylvania.

Respondents Hallcraft Jewelers, Inc. of New Jersey and Crest Clothiers, Inc., which also trades and does business as Crest Collection Agency, and wholly-owned subsidiaries of Hallcraft Jewelers, Inc. and are corporations organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with their offices and principal places of business located at 7022 Bristol Pike, Levittown, Pennsylvania.

Respondent Donald J. Bound is an officer of the corporate respondents. He formulates, directs and controls the acts and practices of the corporate respondents, and his address is the same as that of the corporate respondents.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER*

I

It is ordered, That respondents Hallcraft Jewelers, Inc., a corporation, Hallcraft Jewelers, Inc. of New Jersey, a corporation, Crest Clothiers, Inc., a corporation, also trading and doing business as Crest Collection Agency, or under any other name or names, their successors and assigns, and their officers, and Donald J. Bound, individually and as an officer of said corporate respondents, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of jewelry and watches, or other products or services, and in connection with the collection of, or attempting to collect, or assisting in the collection of, or inducing, or attempting to induce the payment of accounts, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from, orally or in writing, directly or by implication:

1. Representing that respondents are either affiliated with or have any official relationship with either the United States Government or the United States Armed Forces.

2. Representing that respondents do not have to charge state sales tax with the sale of their merchandise due to any affiliation with or official relationship with either the United States Government or the United States Armed Forces or for any other reason that is inconsistent with official state sales tax regulations.

3. Representing that respondents can offer low prices for their merchandise due to any affiliation with or official relationship with either the United States Government or the United States Armed Forces, including Military Post Exchanges.

4. Representing that respondents are the exclusive jewelry dealers for military personnel, the United States Armed Forces or any branches therein.

5. Representing that respondents' merchandise is either inspected or approved by military personnel.

6. Representing that respondents register the diamonds they offer for sale with the United States Government.

7. Representing that purchasers who receive an "AAA credit rating" from respondents may then be able to purchase merchandise on credit from merchants other than respondents.

8. Representing that respondents either use or sell only the finest diamonds available.

9. Representing that examination of diamonds before mounting

by respondents, under a 30-power diamond loupe, or any other power loupe will guarantee the brilliance, color, cut, clarity or any other aspect of diamond quality.

10. Representing that through the use of the word "military" in conjunction with a code of business ethics, respondents are affiliated with or have some official relationship with the United States Armed Forces.

11. Representing that respondents will make no misrepresentations to customers regarding their business or services.

12. Representing that respondents will conceal no material facts, either directly or indirectly, which could cause a customer to be misled as to quality of merchandise, nature of service or terms of sale.

13. Representing that respondents will avoid any practice which might place their business under investigation by the Armed Forces Disciplinary Control Board, realizing this Board has the duty to place any establishment which it finds engaged in unfair, immoral or illegal practices, off limits to military personnel.

14. Contracting for any sale whether in the form of trade acceptance, conditional sales contract, promissory note, or otherwise which shall become binding on the purchaser prior to midnight of the third day, excluding Sundays and legal holidays, after the date of execution.

15. Failing to furnish the purchaser with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the purchaser or on the front page of the receipt if a contract is not used and in boldface type of a minimum size of 10 points, a statement in substantially the following form:

> YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

16. Failing to furnish each purchaser, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain in 10 point boldface type the following information and statements in the same language,

e.g., Spanish, as that used in the contract in substantially the following form:

NOTICE OF CANCELLATION

[enter date of transaction]

(Date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST RETURN OR CAUSE TO BE RETURNED TO THE SELLER, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU OR DELIVERED TO ONE DESIGNATED BY YOU, UNDER THIS CONTRACT OR SALE AT THE SELLER'S EXPENSE AND IN COMPLIANCE WITH INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS.

IF YOU FAIL TO RETURN OR CAUSE TO BE RETURNED THE GOODS DELIVERED TO YOU OR THE ONE DESIGNATED BY YOU WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO [*Name of Seller*], AT [*Address of seller's local place of business*], NOT LATER THAN MIDNIGHT OF *(Date)*

I HEREBY CANCEL THIS TRANSACTION.

(Date)

(Buyer's Signature)

17. Failing, before furnishing copies of the "Notice of Cancellation" to the purchaser, to complete both copies by entering the name of the seller, the address of the seller's local place of business, the date of the transaction and the date, not earlier than the third business day following the date of the transaction, by which the purchaser may give notice of cancellation.

18. Including in any sales contract or receipt any confession of

judgment or any waiver of any of the rights to which the buyer is entitled under this order including specifically his right to cancel the sale in accordance with the provisions of this order.

19. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

20. Misrepresenting, directly or indirectly, orally or in writing, the buyer's right to cancel.

21. Failing or refusing to honor any valid notice of cancellation by a buyer and within 10 business days after the receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest in the transaction.

22. Negotiating, transferring, selling, or assigning any note or other evidence of indebtedness to a finance company or other third-party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

23. Failing, within 10 business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to repossess and if so, the manner in which this may be accomplished at the seller's expense, or whether the seller intends to abandon any shipped or delivered goods.

24. Representing that disciplinary action will be taken against debtors upon notification of their superior officers.

25. Representing that legal proceedings will or have been initiated against debtors unless and until such representation is true.

26. Representing that an account will be or has been referred to an attorney for initiation of legal proceedings or that an attorney will be or is actively involved in collecting or reviewing an account, unless, and until such representation is true.

27. Representing that any immediate action will be taken to collect a debt, such as notification of superior officers or turning over accounts to a collection agency, unless, and until such representation is true; or misrepresenting, in any manner, the imminency of any action that respondents may or will take.

28. Representing that respondents maintain a legal department or employ attorneys as part of their debt collection business.

29. Representing that respondents will require debtors to pay all attorneys fees or any other amount of attorneys fees generated, which is in excess of 15 percent of the balance due on a debt.

30. Representing that collection notices sent to debtors by

respondents are sent by a collection agency independent of respondents; or misrepresenting, in any manner, respondents' status, activities, or actions.

31. Representing that respondents will notify the local credit bureaus of any persons other than the debtor's own local credit bureau, and in that instance, only when respondents actually take the represented action, at that stage of the collection process.

32. Representing that a credit investigation will be conducted in the debtor's local area or that a collection agent will call at his home, unless respondents actually cause the action to be taken, at that stage of the collection process.

33. Representing that respondents can validly disclaim liability for any action that they may take in the collection of a debt; or making any other such statements in dunning communications which are unfair because they appear legally conclusive or misleading.

34. Representing through depictions or manifestations of form, that any of respondents' dunning communications constitute legal process forms; or misrepresenting, in any manner, the source, authorization, or approval of any document.

It is further ordered, That respondents cease and desist from using the words "collection agency" or any other words of similar import or meaning in any corporate, firm, partnership or other business or trade name or title which indicates or suggests that respondents individually or collectively, are engaged in the business of collecting money debts for others.

It is further ordered, That respondents, in the course of collecting a debt, cease and desist from communicating, or threatening to communicate with the consumer's employer or any agent of the employer or any other person not liable for the debt other than the spouse or the attorney of the consumer, except as permitted by order of a court or solely to locate a consumer whose whereabouts are genuinely unknown to the creditor or to determine the nature and extent of a consumer's wages or property, provided that, in these latter two instances, there is no specific mention of the alleged indebtedness.

Provided, however, nothing herein shall prohibit respondents from communicating with the recipient of purchased merchandise, but then only for the dual purpose of (1) actually attempting, and not merely threatening, to repossess the merchandise upon the terms and conditions provided by contract between the debtor and respondents and in the same communication, (2) offering said recipient the option of retaining the merchandise upon the recipient's promise to

assume payment of the specified balance due on the debt; *provided* that in these instances, respondents do not fail to also mail copies of any such communication to the named purchaser involved and respondents do not fail to clearly and conspicuously disclose in each such repossession communication that:

> Upon repossession, this account will be marked satisfactorily settled and an immediate credit for the money paid on the account will be forwarded to the attention of the purchaser along with a price catalogue from which said purchaser may be able to choose and receive other merchandise based upon the credit he receives.

It is further ordered, That respondents, upon actual repossession of the purchased merchandise upon the terms and conditions provided by contract between the debtor and respondents and this order, do not fail to mail to said debtor, a price catalogue from which he may be able to choose and receive other merchandise based upon the credit he receives.

It is further ordered, That respondents cease and desist from failing to furnish the purchaser with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.,* Spanish, as that principally used in the oral sales presentation and which contains a clearly and conspicuously disclosed statement in substantially the following form:

> In the course of collecting a debt, Hallcraft Jewelers, Inc. will not communicate or threaten to communicate with a consumer's employer or any agent of the employer or any other person not liable for the debt other than a consumer's spouse or attorney, except as permitted by order of a court, or solely to locate a consumer whose whereabouts are genuinely unknown to the creditor or to determine the nature and extent of a consumer's wages or property, provided that, in these latter two instances, there is no specific mention of the alleged indebtedness. Hallcraft Jewelers may however, communicate with the recipient of any purchased merchandise, but only for the purpose of repossession of their merchandise upon a consumer's default or offering the recipient, in the alternative, the option of retention of the merchandise and assumption of the payments due on the balance of the debt.

Provided, however, that nothing contained in Part I of this order shall relieve respondents of any additional obligations respecting contracts required by federal law or the law of the state in which the contract is made. When such obligations are inconsistent, respondents can apply to the Commission for relief from this provision with respect to contracts executed in the state in which such different obligations are required. The Commission, upon showing, shall make such modifications as may be warranted in the premises.

II

It is further ordered, That respondents Hallcraft Jewelers, Inc., Hallcraft Jewelers, Inc. of New Jersey, Crest Clothiers, Inc., also trading and doing business as Crest Collection Agency, or under any other name or names, corporations, their successors and assigns, and their officers, and Donald J. Bound, individually and as an officer of said corporations, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit, or any advertisement to aid, promote, or assist, directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. Section 226) of the Truth in Lending Act, as amended, (Pub. L. 90-321, 15 U.S.C. 1601, *et seq.),* do forthwith cease and desist from:

1. Failing to use the term "cash price" as defined in Section 226.2(i) of Regulation Z, to describe the purchase price of the merchandise or service, as required by Section 226.8(c)(1) of Regulation Z.

2. Failing to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

3. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

4. Failing to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

5. Failing to use the term "deferred payment price" to describe the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, as required by Section 226.8(c)(8)(ii) of Regulation Z.

6. Failing to use the term "total of payments" to describe the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

7. Failing to properly disclose the amount, or method of computing the amount, of a delinquency charge payable in the event of late payments, as required by Section 226.8(b)(4) of Regulation Z.

8. Failing to make all required disclosures together on either the note or other instrument evidencing the obligation on the same side of the page and above or adjacent to the place for the customer's

signature, or on one side of a separate statement which identifies the transaction, as required by Section 226.8(a) of Regulation Z.

9. Failing, in any advertisement for an extension of consumer credit which is repayable in more than four installments without the imposition of a separately stated finance charge, to disclose clearly and conspicuously, "THE COST OF CREDIT IS INCLUDED IN THE PRICE QUOTED FOR THE GOODS AND SERVICES," as required by Section 146 of the Truth in Lending Act and Section 226.10(f) of Regulation Z. Such disclosure shall appear:

(a) immediately adjacent to the price, whenever the price is quoted, either as a monthly payment or a total payment amount; and

(b) immediately above the space provided for the customer's signature on the merchandise order form.

10. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of any installment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(i) the cash price;

(ii) the amount of the downpayment required or that no downpayment is required, as applicable;

(iii) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(iv) the amount of the finance charge expressed as an annual percentage rate; and

(v) the deferred payment price.

11. Failing, in any consumer credit transaction or advertising, to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z at the time and in the manner, form and amount required by Sections 226.6, 226.7, 226.8 and 226.10 of Regulation Z.

It is further ordered, That respondents shall forthwith deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the offering for sale or sale of respondents' products or services or in the consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, or in the collection of accounts, and that respondents secure a signed statement acknowledging the receipt of the order from each such person.

It is further ordered, That respondents shall, within thirty (30) days

after service of this order upon respondents, distribute a copy thereof by registered or certified mail to each military base commander within a twenty-five (25) mile radius of each of respondents' retail stores.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of five years from the effective date of this order, the individual respondent shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the manufacture, advertising, offering for sale, sale and distribution of jewelry and watches or the extension of consumer credit or the collection of accounts resulting from the retail sale of products or services, or of his affiliation with a new business or employment in which his own duties and responsibilities involve the manufacture, advertising, offering for sale, sale and distribution of jewelry and watches or the extension of consumer credit or the collection of accounts resulting from the retail sale of products or services. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising out of the order.

It is further ordered, That respondents shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

MELVIN S. LANDOW, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2886. Complaint, May 9, 1977—Decision, May 9, 1977

This consent order, among other things, requires the former controlling officers of a now bankrupt appliance store chain (Kennedy and Cohen, Inc.) to cease misrepresenting pricing and savings claims; and cease using bait and switch tactics, or any other unfair or deceptive strategy to promote sale of goods and services. Additionally, respondents are required to conspicuously post disclosure notices and maintain relevant records as prescribed in the order.

Appearances

For the Commission: *H. Marshall Korschun* and *Thomas D. Wilson, Jr.*

For the respondent: *Harris J. Buchbinder, Reiseman & Buchbinder,* Miami, Fla.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, as amended, the Federal Trade Commission, having reason to believe that Melvin S. Landow and Dean Willman, individually, hereinafter referred to as respondents, have violated the provisions of said Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Melvin S. Landow and Dean Willman are individuals and were officers and/or directors of Kennedy and Cohen, Inc., a Florida corporation. The said individual respondents formulated, directed and controlled the acts and practices of Kennedy and Cohen, Inc., including the acts and practices hereinafter set forth. The address of respondent Melvin S. Landow is 4340 North Bay Road, Miami Beach, Florida. The address of respondent Dean Willman is 7105 Miami Lakes Drive, West, Miami Lakes, Florida.

The aforementioned respondents cooperated and acted together in the carrying out of the acts and practices hereinafter set forth.

PAR. 2. Respondents have been engaged in the advertising, offering for sale, sale and distribution of household appliances and home entertainment products, including, but not limited to, televisions, stereo equipment, washers and dryers, refrigerators and air condi-

tioners, hereinafter referred to collectively as household appliances. Respondents operated and controlled one of the largest household appliance retailers in the United States, with sales from Kennedy and Cohen, Inc.'s retail outlets in 1974 approximating $50 million.

PAR. 3. In the course and conduct of their business as aforesaid, respondents have caused advertising layouts, sales memoranda, policy directives and other documents and communications to be transmitted by the United States mail to and from respondents' offices and said retail stores located in various States of the United States.

In the further course and conduct of their business, respondents sold and distributed household appliances in commerce by causing said appliances to be shipped from places of business of their several suppliers, located in various States of the United States, to storage points and to said retail stores for sale to the purchasing public, located in states other than those from which said shipments originated.

In the further course and conduct of their business, respondents caused advertisements for household appliances to be published in media of interstate circulation and to be broadcast by television and radio stations having sufficient power to carry such broadcasts across state lines, which were designed and intended to induce persons to purchase said household appliances.

Thus, respondents' volume of business was substantial and their acts and practices, as hereinafter set forth, were in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their household appliances, respondents made numerous statements and representations by means of television and radio broadcasts, by means of advertisements inserted in newspapers and by means of oral statements and representations of their salesmen and other agents and employees to prospective purchasers with respect to their products and services.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

(1)

18" Diagonal COLOR TV PORTABLE
At Huge Warehouse Savings!
$138

RCA 25" Diagonal COLOR TV CONSOLE
Has AccuColor for Sharp, Crisp Picture
in Life-Like Color

Automatic Fine Tuning
100% Solid State
$397

25" Diagonal COLOR TV CONSOLE
Contemporary Style
Black Matrix Picture Tube
Automatic Fine Tuning
Instant-On Picture
$267

General Electric DRYER AND WASHER
$248
When You Buy the Pair

LAUNDRY
Kennedy and Cohen carries top brands like GENERAL ELECTRIC, WHIRLPOOL, and others all at special savings with a WHIRLPOOL ELECTRIC DRYER AND AUTOMATIC WASHER priced as low as $94 each.
When You Buy the Pair.

GUARANTEED LOWEST PRICES IN THIS AREA
16 Cubic Foot Refrigerator
$197

(2)
14 HOUR SALE!
Saturday 10:00 A.M. to Midnight

(3)
GRAND OPENING
We're getting bigger to serve you better! Our new Houston Warehouse Showroom means even bigger purchasing power! We're celebrating chain-wide with extra markdowns on a huge variety of famous brands of appliances and TV's. Come in and save!

EMERGENCY SALE
Unavoidable construction delays at our new Miami Complex have caused merchandise that arrived too soon to pile up on our loading docks! We're repricing a huge variety of TV's, appliances and audio components. Famous brands like RCA, ZENITH, GE, WHIRLPOOL, FISHER save you even more!

(4)

HOLIDAY MARATHON
Special! Two Days Only. 12" Black and White Portable TV, $9, When You Buy Any Color TV, Air Conditioner, Refrigerator, Range/Oven, Washer, Dryer or Audio System.

(5)
DIRECT TO CONSUMER
(6)
"JULY SALES JAMBOREE"

COLOR PORTABLES
Kennedy and Cohen carries Top Brands like GENERAL ELECTRIC, RCA, ZENITH and others all at special savings with a Kenco 18" diagonal COLOR TV PORTABLE priced as low as
$169

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral

statements and representations of respondents' salesmen to customers and prospective customers, respondents represented, directly or by implication, that:

1. Respondents were making a bona fide offer to sell the advertised household appliances at the price and on the terms and conditions stated in the advertisement.

2. Respondents had available sufficient quantities of the advertised appliances to meet reasonably anticipated demand.

3. By and through the use of their advertising illustrations, in connection with the special "sale" events, that:

a. advertised household appliances could be purchased at reduced prices and purchasers were thereby afforded savings from respondents' regular selling prices;

b. household appliances were available at these special selling prices for a limited period of time and would return to and, for a reasonable period of time, remain at some substantially higher amount after the expiration of the limited period.

4. By and through the use of the term "14 HOUR SALE!", as set out in Paragraph Four (2), and other terms of similar import and meaning not specifically set out herein, that the price at which such household appliances were being offered constituted a significant reduction from respondents' previously established regular selling price.

5. By and through the use of the terms "Grand Opening," "Emergency Sale," as set out in Paragraph Four (3), and other words of similar import and meaning not specifically set out herein, that respondents reduced prices as a consequence of the unusual sale event and, thereby, implied that the public should act immediately to take advantage of these unusual circumstances.

6. By and through the use of an advertisement such as set out in Paragraph Four (4), and others of similar import and meaning not specifically set out herein, that respondents offered a black and white portable television for the price of $9 when the customer bought any color television, air conditioner or other similar household appliance.

7. By and through the use of the words "DIRECT TO CONSUMER," as set out in Paragraph Four (5), that respondents did not buy through normal distribution channels, that respondents operated as wholesale distributors and that respondents sold at less than retail prices.

8. By and through the use of advertising illustrations, as set out in Paragraph Four (6), and other advertisements of similar import and meaning not specifically set out herein, that respondents were

selling a variety of color portable televisions, including Zenith, RCA and GE, for the advertised price.

PAR. 6. In truth and in fact:

1. Most, if not all, of respondents' offers were not bona fide offers to sell said household appliances at the price and terms and conditions stated in the advertisement. To the contrary, some of said offers were made for the purpose of obtaining leads to persons interested in the type of household appliance so advertised. Members of the purchasing public who responded to said advertisements were shown other appliances, usually at a higher price and a higher margin of profit. Respondents' salesmen made little or no effort to sell the advertised appliances, and in some instances disparaged the advertised appliances in an attempt to sell other appliances with a higher margin of profit. Respondents used a method of compensating their salesmen designed to encourage sale of the higher profit margin items.

2. Respondents failed, in numerous instances, to have available sufficient quantities of the advertised product to meet reasonably anticipated demands.

3. Respondents' household appliances were not being offered for sale at "special" or reduced prices. To the contrary, in a substantial number of instances:

a. respondents' advertised selling prices and their regular selling prices were the same or substantially the same, and respondents used the aforementioned statements to mislead prospective customers into believing there is a savings, in a not insignificant amount, from respondents' regular selling price;

b. many of respondents' represented "special" selling prices were not returned to, or if returned did not for a reasonable period of time remain at, some other substantially higher amount. Instead, said prices remained at or near, or subsequently returned to or near, the represented "special" prices. Thus, the period during which the "special" prices were available was not, in these instances, limited as stated in said advertisements.

4. Many of respondents' represented reduced prices were not reduced. Where respondents did reduce their regular selling prices, the amount of the reduction was, in many instances, insignificant.

5. Respondents did not reduce prices as a consequence of the special events. Rather, said sale events were used by respondents for

the purpose of creating in the purchasing public a false sense of urgency.

6. Respondents did not offer the black and white television for an actual price of $9 in connection with another major purchase. Rather, respondents uniformly increased the prices of the appliances connected with the $9 television offer, thereby misleading the purchasing public as to the true cost of the advertised television.

7. Respondents were not wholesale distributors and did not always sell at less than retail prices.

8. Respondents did not offer a variety of color portable televisions at the advertised price. Rather, a color portable television made especially for respondents is the only television which is offered at the advertised price, although the advertisement implied the consuming public may have purchased a "name brand" television at the stated price.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were false, misleading and deceptive.

PAR. 7. In connection with respondents' sale of household appliances, respondents sold service contracts for continuing maintenance and repair of the purchased appliances. Respondents encouraged their salesmen to sell said contracts by methods of compensation, and respondents provided their salesmen with materials to assist in the sale of said service contracts.

In many instances, said sales materials contained false and misleading information such as, but not limited to, the following: (1) the frequency of repair statistics, (2) cost of repair statistics, (3) cost comparison with service contracts offered by other appliance dealers.

PAR. 8. The acts and practices of respondents as alleged in Paragraph Seven of using false and misleading information in the sale of service contracts, and using methods of compensation to encourage their salesmen to sell said service contracts, had the tendency and capacity to mislead the consuming public as to the advisability of purchasing such a service contract for their appliances.

Therefore, the acts and practices of respondents as set forth in Paragraph Seven were unfair, false, misleading and deceptive.

PAR. 9. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been in substantial competition, in or affecting commerce, with corporations, firms and individuals in the sale and distribution of household appliances of the same general kind and nature as those sold by respondents.

PAR. 10. The use by respondents of the aforesaid unfair, false, misleading and deceptive statements, representations, acts and practices and their failure to disclose material facts, as aforesaid, has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete and into the purchase of substantial quantities of respondents' products and services at higher prices than said members of the purchasing public had intended to pay by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of respondents as herein alleged were all to the prejudice and injury of the public and respondents' competitors and constituted unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its Rules, now in conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondents Melvin S. Landow and Dean Willman were

officers and/or directors of Kennedy and Cohen, Inc., a corporation. They formulated, directed and controlled the policies, acts and practices of said corporation. The address of respondent Melvin S. Landow is 4340 North Bay Road, Miami Beach, Florida. The address of respondent Dean Willman is 7105 Miami Lakes Drive, West, Miami Lakes, Florida.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Melvin S. Landow and Dean Willman, individually, their agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale and distribution of household appliances, or of any other products or services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of household appliances or any other product, merchandise or service.

2. Making representations, directly or by implication, orally or in writing, purporting to offer any product, merchandise or service for sale when the primary purpose of the representation is not to sell the offered product, merchandise or service but to obtain leads or prospects for the sale of another product, merchandise or service.

3. Representing, directly or by implication, orally or in writing, that any product, merchandise or service is offered for sale when such offer is not a bona fide offer to sell such product, merchandise or service according to the terms of the represented offer.

4. Disparaging in any manner, discouraging the purchase of, or refusing to sell and deliver, any product, merchandise or service which is advertised or offered for sale.

5. Failing to have available at all outlets listed in the advertisement a sufficient quantity of the advertised product to meet reasonably anticipated demands, unless:

a. The advertisement clearly and adequately discloses the specific quantity of each item advertised that is available at each designated outlet; or

b. The advertisement clearly and adequately identifies those outlets at which merchandise is not immediately available.

6. Failing to maintain and produce for inspection and copying, on demand by the Federal Trade Commission or its representatives, adequate records which reveal for every advertisement disseminated in print or broadcast media, for a period of three (3) years from the date of its publication:

a. The volume of sales made of each advertised product, merchandise or service at the advertised price; and
b. The net profit from the sale of each advertised product, merchandise or service at the advertised price.

7. Using the word "Sale" or any other word or words of similar import or meaning not set forth specifically herein, unless:

a. The price of such merchandise being offered for sale constitutes a reduction, in an amount not so insignificant as to be meaningless, from the actual bona fide price at which such merchandise was sold or offered for sale to the public on a regular basis by respondents for a reasonably substantial period of time in the recent regular course of their business;
b. Respondents clearly and adequately disclose the time period during which the advertised prices will be available; provided that, where the termination point of the "sale" has been advertised in good faith, respondents shall not be prohibited from extending the availability of the advertised prices, making further reductions, or reinstituting terminated price reductions;
c. Products, which are included in the advertisement but do not meet the requirements of 7(a), *supra,* are clearly and adequately identified as not having had a reduction in price.

8. Representing, directly or by implication, orally or in writing, that respondents have lowered prices as a result of some unusual circumstances, unless the circumstances are true and the prices are significantly lower than respondents' usual prices.

9. a. Representing, directly or by implication, orally or in writing, that by purchasing any of respondents' products, merchandise or services, customers are afforded savings amounting to the difference between respondents' stated price and respondents' former price, unless such products, merchandise or services have been sold or offered for sale in good faith at the former price by respondents for a

reasonably substantial period of time in the recent regular course of their business.

b. Representing, directly or by implication, orally or in writing, that by purchasing any of respondents' products, merchandise or services, customers are afforded savings amounting to the difference between respondents' stated price and some other reference price or identical products, merchandise or services in the trade area where such representation is made unless the nature of the reference price is explicitly identified and respondents have a reasonable basis to substantiate the reference price.

c. Representing, directly or by implication, orally or in writing, that by purchasing any of respondents' products, merchandise or services, customers are afforded savings amounting to the difference between respondents' stated price and a compared value price for comparable products, merchandise of services, unless substantial sales of products, merchandise or services of like grade and quality are being made in the trade area where such representation is made at the compared price or a higher price and unless respondents have in good faith conducted a market survey or obtained a similar representative sample of prices in said trade area which establishes the validity of said compared price and it is clearly and conspicuously disclosed that the comparison is with products, merchandise or services of like grade and quality.

10. Failing to maintain and produce for inspection or copying on demand by the Federal Trade Commission or its representatives, for a period of one (1) year from the date of the representation, adequate records:

a. Which disclose the facts upon which any savings claims, sales claims or other similar representations as set forth in Paragraphs 7, 8 and 9 of this order are based; and

b. From which the validity of any savings claims, sales claims and similar representations can be determined.

11. Using any sales or advertising plan in which the purchase of an advertised "special" is dependent upon the purchase of another item, unless:

a. The terms and conditions of the offer are clearly and adequately disclosed in the advertisement; and

b. The recent regular selling price of the item which must be purchased is clearly and accurately disclosed in the advertisement (if advertised) and at the point of sale.

12. Misrepresenting, directly or by implication, orally or in writing, that respondents are wholesalers, sell at wholesale prices, or misrepresenting in any manner the nature, status, connections or scope of respondents' business.

13. Using or providing to salesmen or others materials containing false and misleading information, such as repair and cost comparison statistics, pertaining to the sale of service contracts for continuing maintenance and repair of purchased household appliances.

14. Failing to conspicuously post in the selling areas of each retail sales outlet the following notice:

NOTICE

THIS COMPANY'S POLICY IS TO SELL WHAT IT ADVERTISES. SHOULD YOU ENCOUNTER ANY DIFFICULTY IN PURCHASING AN ADVERTISED ITEM, CALL (place here the telephone number of the local manager or other appropriate and correct telephone numbers).

15. Failing to maintain and produce for inspection and copying on demand by the Federal Trade Commission or its representatives, for a period of one (1) year from the date of communication, adequate records to disclose facts pertaining to the receipt, handling and disposition of each communication from a customer, oral or written, concerning difficulty in purchasing an advertised item.

16. Failing to maintain for at least a one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of household appliances or utilized in the advertising, promotion or sale of household appliances and other merchandise.

It is further ordered, That the record keeping provisions of this order (Paragraphs 6, 10 and 16) do not pertain to any corporation or partnership not controlled, directly or indirectly, by any respondent.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the offering for sale or the sale of any product, or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten years from

the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

GENESCO INCORPORATED

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9019. Complaint, March 11, 1975 — Decision, May 17, 1977

This order, among other things, requires a Nashville, Tenn., operator of a retail clothing chain to cease writing off credit balances; failing to furnish statements advising customers of credit balances and their right to request and receive refunds. The order further requires the firm to refund monies due customers from January 1, 1972 to date and maintain prescribed information for a period of three years.

Appearances

For the Commission: *Alan D. Reffkin, Justin Dingfelder* and *John F. LeFevre.*

For the respondent: *Sanford M. Litvack, Kenneth E. Newman* and *Melanie S. Cutler, Donovan, Leisure, Newton & Irvine,* New York City.

COMPLAINT

[1] Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Genesco Incorporated, a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Genesco Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal office and place of business located at 111 7th Ave. North, Nashville, Tennessee. Respondent Genesco Incorporated formulates, controls and directs the policies, acts and practices, including those hereinafter set forth, of its retail apparel and footwear divisions, including its division, Bonwit Teller.

Bonwit Teller is a division of Genesco Incorporated. Its principal office and place of business is located at 56th St. and Fifth Ave., New York, New York.

PAR. 2. Respondent Genesco Incorporated, through its operating division, Bonwit Teller, operates a number of retail specialty clothing

stores in a number of states. Respondent also operates numerous other retail divisions for the retail sale of shoes and wearing apparel.

PAR. 3. Respondent sells and distributes merchandise in commerce by operating and controlling numerous retail specialty apparel and footwear stores in a number of states and by causing merchandise to be shipped from its warehouses and from the places of business of its various suppliers to its warehouses and retail specialty apparel [2] and footwear stores for distribution to and purchase by the general public located in states other than those from which such shipments originate. By these and other acts and practices, respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in merchandise and services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of its aforesaid business, respondent permits customers of many of its retail divisions, including its Bonwit Teller division, who qualify for credit to charge purchases. On occasion a customer's charge account balance reflects a credit on the customer's account which represents an amount of money owed to the customer by respondent, rather than an amount of money owed to respondent by the customer. This credit balance is the result of, among other things, overpayments by the customer or credits for returned merchandise.

PAR. 5. Typical and illustrative of respondent's practices in the handling of customer accounts are the following: Respondent customarily provides to each customer of Bonwit Teller having a charge account credit balance a monthly statement setting forth the amount of the credit balance. This statement is usually mailed at the end of the billing cycle during which the credit balance is created and at the end of each subsequent billing cycle during which the credit balance has not been cleared from the customer's account and a transaction on the customer's account occurs. No such statement is provided for any billing cycle during which the customer transacts no business on his charge account.

If a customer with a credit balance on his charge account does not specifically request that respondent pay him the amount of his credit balance but purchases merchandise or services on his charge account, respondent for a limited time only applies the amount of the credit balance to reduce or eliminate the customer's obligation created by the purchase of merchandise or services.

If the customer neither requests a refund in cash of the amount of the credit balance nor makes a purchase within a period of time allowed by respondent for activity to occur on the customer's account,

respondent, through bookkeeping entries, clears the amount of the credit balance from the customer's charge account. No cash payment is made to the customer at the time of the clearing of his credit balance from his charge account. Subsequent [3] periodic statements are not mailed until a later purchase is made. The outstanding credit balance that was previously reflected on a periodic billing statement is not applied to any purchase occurring after the credit balance has been cleared from the customer's account.

At no time is the customer informed of his right to request and receive a cash refund nor does respondent voluntarily refund cash representing outstanding credit balances without a specific customer request. Respondent has through such acts and practices eliminated substantial dollar amounts of credit balances as aforesaid from customer accounts in a substantial number of instances.

PAR. 6. By failing to notify customers with charge account credit balances that they have the right to request and receive cash payment of the amounts of their credit balances; by failing to furnish customers with statements reflecting the amount of their credit balances; by deleting credit balances from customers' accounts without refunding such amounts and by providing billing statements for subsequent purchases which do not reflect such credit balances, respondent has caused a substantial number of its charge account customers to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Five above were and are unfair.

PAR. 7. The acts and practices of respondent set forth in Paragraphs Five and Six above were and are to the prejudice and injury of the public and constitute unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY ERNEST G. BARNES, ADMINISTRATIVE LAW JUDGE

DECEMBER 20, 1976

PRELIMINARY STATEMENT

[1] On March 11, 1975, the Commission issued its complaint in this matter charging that respondent Genesco Incorporated (hereinafter "Genesco"), through unfair acts and practices in connection with the handling of credit balances on charge accounts of its retail divisions' customers, has violated Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45) (Complaint, ¶ 7).

Specifically, the complaint alleges that Genesco formulates, con-

trols and directs the policies, acts and practices of its retail apparel and footwear divisions [2] (Complaint, ¶ 1). The complaint further alleges that, through such divisions, respondent has caused a substantial number of its retail charge account customers to be deprived of substantial sums of money rightfully theirs by:

(1) failing to notify customers with charge account balances that they have the right to request and receive cash payment of the amounts of their credit balances;

(2) failing to furnish customers with statements reflecting the amount of their credit balances for billing cycles during which no business is transacted on their charge accounts;

(3) deleting credit balances from customers' accounts after a limited time of inactivity without refunding such amounts; and

(4) providing billing statements for purchases made subsequent to such deletions which do not reflect such credit balances (Complaint, ¶¶ 5 and 6).

On May 14, 1975, in response to Genesco's Motion for a More Definite Statement, complaint counsel clarified the scope of the complaint by: (1) specifying that the time period to which the acts and practices alleged in the complaint relate is approximately January 1, 1972 to the present, and (2) limiting the alleged violative acts and practices to those charge account plans administered directly by Genesco or its divisions (Answer to Motion for a More Definite Statement, p. 1).

Thereafter, on July 14, 1975, respondent answered the complaint, denying the substantive allegations and asserting as affirmative defenses that the complaint failed to state a claim upon which relief could be granted, did not set forth facts which, if proved, would constitute a violation of the Federal Trade Commission Act, that the complaint and proceedings commenced thereby were not in the public interest, and that the issues presented by the complaint and this proceeding were moot.

Prehearing conferences were held on November 12, 1975, January 8, 1976, and May 13, 1976. At the November 12th and May 13th proceedings, deposition testimony was given by Mr. Larry B. Shelton, Vice Chairman and Chief Administrative [3] Officer of Genesco. Stipulations of fact (CX 89A-H) were entered into on July 2, 1976.

Hearings on complaint counsel's case-in-chief were held in Washington, D.C., on July 12–15 and July 22, 1976. On July 22, 1976, respondent commenced defense hearings which were held through July 23, 1976. Rebuttal hearings were held on August 4th and 18th, 1976. The record was closed for the reception of evidence by order dated August 23, 1976.

Complaint counsel called 9 witnesses during their case-in-chief and the stipulated testimony of a tenth witness was read into the record. Nine of complaint counsel's direct witnesses testified as to customer transactions with three Genesco divisions — Bonwit Teller (5 witnesses), Henri Bendel (2 witnesses), and Roos/Atkins (2 witnesses). The tenth direct witness called by complaint counsel was a staff accountant of the Federal Trade Commission. During rebuttal, complaint counsel called three additional witnesses, all Assistant General Credit Managers of respondent's competitors.

Respondent called four witnesses during defense hearings — an officer of Genesco, an officer of the Bonwit Teller division, the Manager of Customer Service and Bill Adjustment of the Bonwit Teller division and the Director of Accounting of the General Shoe Division of Genesco.

There were eight days of formal hearings and 142 exhibits, many multi-paged, received in evidence during the hearings.

Proposed findings of fact and supporting memoranda were filed by complaint counsel on October 6, 1976, and by respondent by October 7, 1976. Reply briefs were filed by complaint counsel on October 21, 1976, and by respondent on October 22, 1976.

This proceeding is before the undersigned upon the complaint, answer, testimony and other evidence of record, proposed findings of fact, conclusions and supporting memoranda filed by the parties. These submissions have been given careful consideration and, to the extent not adopted by this Initial Decision in the form proposed or in substance, are rejected as not supported by the record or as immaterial. Any motions not heretofore or herein [4] specifically ruled upon, either directly or by the necessary effect of the conclusions in this Initial Decision, are hereby denied. The findings of fact made herein are based on a review of the entire record and upon the demeanor of the witnesses who gave testimony in this proceeding.

The findings of fact made herein include references to the principal supporting evidentiary items in the record. Such references are intended to serve as convenient guides to the testimony and exhibits supporting the findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

Findings of Fact

I. IDENTITY AND BUSINESS OF RESPONDENT

1. Genesco is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its

principal office and place of business at 111 - 7th Ave., North, Nashville, Tennessee (Answer, ¶ 1). In addition to the manufacture of footwear, apparel, and materials and components thereof, Genesco sells and distributes merchandise in commerce and, through its divisions, operates retail specialty apparel and footwear stores in a number of states (Answer, ¶ 3; CX 1E).

2. During 1972 to 1974, Genesco was "engaged in commerce", as defined in the Federal Trade Commission Act (CX 89A).

3. Sales and earnings by Genesco's retail operations for the years 1972 through 1974 are reflected in the following chart:

	NET SALES	*PRETAX EARNINGS*
1972	$429,445,000	$9,102,000
1973	$438,488,000	$12,458,000
1974	$441,319,000	$11,113,000

[5] Genesco's retail operations in 1974 accounted for 30.9 percent of net sales and 27.5 percent of pretax earnings (CX 3A[1]).

4. During the period 1972 to 1974, eighteen (18) divisions of Genesco maintained charge account plans whereby customers who qualified were permitted to charge their purchases (CX 89B; Answer, ¶ 4). These divisions were Baron's, Bonwit Teller ("Bonwit"), Burkhardt-Davidson's, Burkhardt's, Gidding-Jenny, Gilbert's, Graves-Cox, Hall-Brown, Henri Bendel ("Bendel"), I. Miller, Interstate Shoe ("Interstate"), L. Strauss, McFarlin's, Plymouth, R.A.M., Roos/Atkins ("Roos"), Tate-Brown, and Valmart. Two of these divisions, I. Miller and L. Strauss, discontinued their credit plans during 1974 (CX 89B, C). Charge account plans within the scope of the complaint encompass retail consumer open end credit or other retail consumer charge accounts, including, but not necessarily limited to, thirty (30) day charge accounts, created incident to the business of selling consumer merchandise and services at retail (Complaint, Notice Order; Complaint Counsel's Proposed Finding 20).

5. The total number of customer charge accounts, by divisions, believed to have been in effect during 1972-1974 were: [6]

Year

[1] These percentage figures are in relation to respondent's continuing business operations only. Such business falls into five major areas of operations: retailing, footwear men's apparel, women's apparel, and international operations (CX 2D, 3A).

	1972	*1973*	*1974*
Baron's	27,000	27,878	29,471
Bonwit Teller	1,037,931	1,107,104	1,154,236
Burkhardt-Davidson's	9,320	8,234	9,351
Burkhardt's	26,344	25,414	24,875
Gidding-Jenny*	40,000	40,000	35,000
Gilbert's	25,000*	19,652	28,316
Graves-Cox*	20,000	20,000	20,000
Hall-Brown*	12,000*	12,000*	16,748
Henri Bendel*	33,000	33,000	33,000
I. Miller*	68,000	64,000	credit plan discontinued
Interstate Shoe*	35,000	35,000	30,000
L. Strauss	32,737	35,503	credit plan discontinued
McFarlin's*	35,000	35,000	41,500
Plymouth*	200,000	200,000	130,000
R.A.M.*	43,500	38,390	44,469
Roos/Atkins	406,690	375,550	358,941
Tate-Brown*	16,300	16,300	16,300
Valmart*	2,000	2,000	1,500
Total	2,069,822	2,095,025	1,973,707

* Numbers indicated are approximations.

(CX 89B, C.)

6. At all times relevant to this action, Genesco had the authority to formulate, control and direct the policies, acts and practices regarding the handling of credit balances of its retail divisions (CX 89A; Respondent's Post-Trial Memorandum, fn., p. 10).

II. CREATION AND HANDLING OF CREDIT BALANCES

7. The term "credit balance" means an amount reflected as owing to a customer in connection with a retail consumer charge account of the type covered by the complaint. A credit balance can be created by, among other things, a [7] return of merchandise or an overpayment (Answer, ¶ 4; CX 89A).[1]

8. On occasion, the balance on customer charge accounts administered by Genesco's retail divisions reflected credit balances which represented an amount of money owed by respondent to the customer (Answer, ¶ 4; CX 89D, E, F). Prior to 1974, the method of handling

[1] An invalid credit balance may also be created by double crediting of a payment or other accounting errors. Such invalid credit balances are not within the scope of acts and practices challenged in the complaint.

these credit balances was left to the sole discretion of each division's local management (CX 89D).[2]

9. From 1972 to 1974, charge customers were notified of the existence of a credit balance by a billing statement sent by respondent's retail divisions at the end of the billing period in which the credit balance was created and for each subsequent billing period in which there was activity on the account (CX 89F–G). In some divisions, *e.g.,* Interstate, billing statements were sent on accounts in which a credit balance existed regardless of whether or not there had been activity on the account (CX 89G).

10. Billing statements used by respondent's retail divisions during the 1972 calendar year indicated the existence of a credit balance by placing a dash (-) (CX 9, 88C) or the letters "CR" (CX 4A, 5A, 7A, 11A, 13, 76A) immediately to the right of the figure appearing in the "Balance," "New Balance," "Present Balance" or "Now Due" column of the statement. On some 1972 statements, this was the sole indication of the existence of a credit balance (CX 4A, 7A, 11A, 88C). Other 1972 statements contained [8] the additional notation "CREDIT BALANCE" (CX 5A); "DO NOT PAY CREDIT BALANCE DUE YOU" (CX 9); "DO NOT PAY THIS BILL. THE FINAL RED FIGURE indicates a credit balance, against which future purchases may be charged" (CX 13);[3] or statements of similar import (CX 76A).

11. Billing statements used by respondent's retail divisions during the 1973 calendar year indicated the existence of a credit balance by placing a dash (-) (CX 12A, 31D) or the letters "CR" (CX 7B, 11B, 38B, 78A) immediately to the right of the figure appearing in the "New Balance" or "Now Due" column of the statement. On some 1973 statements, this was the sole indication of the existence of a credit balance (CX 4B, 7B, 12A, 38B, 78A). Other 1973 statements contained the additional notation "THIS IS A CREDIT BALANCE PLEASE DO NOT PAY" (CX 11B) or "YOU HAVE A CREDIT BALANCE" (CX 31D).

12. Billing statements used by respondent's retail divisions during the 1974 calendar year indicated the existence of a credit balance by placing a dash (-) (CX 4C, 10, 12B, 30A, 34, 36A; RX 2A, 3A, 6A), asterisk (*) (CX 8) or the letters "CR" (CX 6A, 7C, 11C, 66A, 67) immediately to the right of the figure appearing in the "Balance," "New Balance," "Now Due" or "Balance Due" column of the

[2] Evidence was not received as to the nuances of each division's credit balance practices. However, it is not a prerequisite to the issuance of a cease and desist order that all divisions of respondent be in violation of Section 5. For purposes of this proceeding, the evidence is sufficient if a finding of violation can be made based on the acts and practices of some of Genesco's retail divisions.

[3] Due to the method used in reproducing exhibits received in evidence, it is impossible to discern whether the existence of a credit balance was also indicated by red, or a similarly distinct, color of ink. The reference in CX 13 would indicate that this method of indicating a credit balance was used by some divisions but the prevalence of this practice cannot be determined from the exhibits. (See also CX 66A.)

statement. On some 1974 statements, this was the sole indication of the existence of a credit balance (CX 6A, 7C, 12B, 66A, 67). Other 1974 statements contained the additional notation "YOU HAVE A CREDIT BALANCE" (CX 4C, 30A, 34, 36A; RX 2A, 3A, 6A) or "CREDIT BALANCE DUE YOU * * *" (CX 8).

13. Billing statements similar to those described in Findings 10–12 were used by respondent's retail divisions during the 1975 calendar year (CX 5B, 6C, 35A, 37A, 39, 40B, 41A).

[9] 14. A few billing statements used in late 1974 and 1975, which were received into evidence, apparently reflect the mid-1974 change in corporate policy regarding the handling of credit balances (see *infra*, Finding 37). CX 6B, dated October 20, 1974, contains the notation "THIS CREDIT BALANCE WILL BE REFUNDED TO YOU AT YOUR REQUEST." Some billing statements used during November of 1974 contained the following notations regarding credit balances:

THIS IS A CREDIT BALANCE PLEASE DO NOT PAY IF YOU WISH A REFUND OF THIS AMOUNT, PLEASE ADVISE. THANK YOU

[CX 11C.]

YOU MAY REQUEST A REFUND OF THE NEW BALANCE BELOW AT ANYTIME OR YOU MAY LEAVE THE BALANCE ON YOUR ACCOUNT TO REDUCE THE AMOUNT DUE ON FUTURE PURCHASES

[CX 10.]

Some billing statements used in 1975 contained the following notation:

* * NO PAYMENT IS REQUIRED * *

YOUR NEW BALANCE IS MONEY WE OWE YOU. YOU MAY REQUEST A REFUND BY RETURNING THIS FORM TO OUR STORE IN PERSON OR BY MAIL. IF YOU DO NOT CHARGE AGAINST THIS CREDIT OR REQUEST A REFUND, A CHECK WILL BE MAILED TO YOU AFTER 6 MONTHS. [CX 4E; RX 33.]

(See also, CX 6D and 7D which notify customer that existing credit balance will be refunded upon request.)

15. Prior to the 1974 corporate policy change, there was no policy or practice to notify charge account customers formally of their right to request and receive cash refunds of an outstanding credit balance (CX 89G).

16. During the period prior to Genesco's adoption of a centralized corporate policy for handling credit balances, certain divisions routinely transferred credit [10] balances from customer accounts where there had been no activity on the account for varying periods

of time. Activity on the account, as used herein, includes, among other things, purchases, returns or payments (CX 89D).

17. The evidence offered by complaint counsel at trial focused on the pre-1974 practices of four Genesco divisions — Bonwit, Bendel, Interstate and Roos. The periods of time of inactivity during which credit balances were retained on these divisions' individual customer charge accounts prior to transfer were as follows:

	Minmum	*Maximum*
Bonwit	6 Months	17 Months
Bendel	18 Months	20 Months
Interstate	6 Months	
Roos	6 Months	11 Months

[CX 89F, G.]

18. Although the individual divisions established minimum periods of inactivity prior to deletion of credit balances, witnesses called by complaint counsel testified that the Bendel division during pre-1974 failed to follow its official policy in this regard requiring a minimum of 18 months inactivity and deleted credit balances in periods of two to five months (Sixsmith, Tr. 207–216; Steiner, Tr. 371–384; Lewis, Tr. 560–63). Respondent admits that an employee of Bendel failed to follow company policy by prematurely transferring credit balances (see Finding 41, *infra*), but asserts that such isolated deviations do not negate the existence of the stipulated company policy.

19. The total dollar amounts of customer credit balances (and number of accounts affected, where available) transferred from customer accounts by Genesco divisions during the periods shown were: [11]

Dollar Amounts and No. of Accounts
(in parentheses where available) per year

Division	*1972*	*1973*	*1974*	*1975 (to 3/31/75)*
Baron's	$ 0	$ 0	$ 4,038.78	$ 0
	(0)	(0)	(134)	(0)
Bonwit Teller	158,939.19	151,501.20	103,198.42	0
Burkhardt-Davidson's	0	0	1,340.19	0
	(0)	(0)	(198)	(0)
Burkhardt's	3,520.32	86	364.14	0
Gidding-Jenny	0	0	3,113.17	0
	(0)	(0)	(130)	(0)
Gilbert's	0	747.19	6,011.36	76.29
	(0)	(271)	(698)	(30)
Graves-Cox	0	0	0	0

	(0)	(0)	(0)	(0)
Hall-Brown	$ N/A	$ N/A	$ 2,327.74	$ 0
			(183)	
Henri Bendel	35,226.31	32,896.09	26,413.54	182.29
	(1,059)	(1,189)	(871)	(3)
I. Miller	0	0	0	0
	(0)	(0)	(0)	(0)
Interstate Shoe	18,253.17	12,381.73	2,824.66	0
	(3,968)	(2,588)	(710)	(0)
L. Strauss	0	0	24,760.75	0
	(0)	(0)	(1,120)	(0)
McFarlin's	3,722.91	3,614.02	5,574.91	88.51
Plymouth	651.00	51,520.20	8,739.47	54.47
R.A.M.	N/A	N/A	6,450.82	0
Roos/Atkins	48,145.46	54,429.40	48,927.62	0
	(2,982)	(3,672)	(2,254)	(0)
Tate-Brown	0	0	2,722.00	0
Valmart	9.45	65.69	36.95	18.15
	(1)	(64)	(18)	(15)

(CX 89D, E.)

[12] The amounts set forth above include credit balances which were valid as well as invalid. Some of these credit balances set forth above were subsequently reinstated on the customer's account or refunded to the customer (CX 89F).

20. When a credit balance was transferred from charge accounts, an accounting entry was made debiting the customer's account (Shelton, Tr. 41–42; Rowe, Tr. 588; Owen, Tr. 686; CX 15A–B, 16A–K, 17A–Z(3), 18A–U, 20A–U, 22A–E, 23, 24, 25A–I, 26A–F, 28A–K, 29A–Z(102). As the chart reproduced in Finding 19 demonstrates, the total debits made to customer accounts from 1972–1974 were substantial, *i.e.*:

	Total Amount Debited by Genesco Retail Divisions[4]
1972	268,467.81
1973	308,017.65
1974	246,844.52
	823,329.98

21. Prior to Genesco's adoption in mid-1974 of a corporate policy regarding the handling of credit balances, there was no policy or practice in any of the divisions to notify charge account customers that credit balances routinely would be transferred out of accounts in which no activity occurred during specified periods of time (CX 89G).

[4] Debits included some invalid credits on customer accounts as well as amounts subsequently reinstated on an account or refunded to customers.

22. Prior to Genesco's adoption in mid-1974 of a coporate policy regarding the handling of credit balances, credit balances which were transferred were not thereafter automatically reinstated on the customer's account, offset against future purchases or refunded without a request from the customer (CX 89G). [13]

III. REFUND POLICY

23. In general, prior to the 1974 corporate policy, requests for refunds or for reinstatement of valid credit balances, or that such balances be applied against future purchases, were to be honored (CX 89G).

24. As evidenced by the billing statements used by respondent's retail divisions, charge account customers were not explicitly advised of their right to make such requests (see Findings 10–12 and CX 89G).

25. Although the existence of the refund policy set forth in Finding 23 was not challenged, three charge customers of the Bonwit division called by complaint counsel testified they had experienced difficulties in obtaining reinstatement of credit balances transferred from their accounts. These customers testified that two to four months elapsed between their initial requests and reinstatement of their credit balances and that a series of written and verbal requests were required to effectuate such reinstatement (Stauffer, Tr. 278–317; Goldberg, Tr. 342–46; Taub, Tr. 527–539).

26. Under Bonwit's current system for handling customer requests for refund of credit balances, approximately 90 percent of these requests are processed within two days and the remainder are processed within five days. If no request is received within six months, a refund is automatically sent to the charge customer (Lempfert, Tr. 656). An aging system has been established within Bonwit's Customer Service and Bill Adjustment Department so that, after one week has elapsed, the handling of any inquiry or complaint, especially dealing with a credit balance, is given immediate priority (Lempfert, Tr. 656–57).

IV. ACCOUNTING PROCEDURE UTILIZED FOR TRANSFER OF CREDIT BALANCES

27. As noted above, in order to effectuate a transfer of a credit balance, a customer's charge account would be debited and a corresponding credit would be entered in a corporate account such as the "Due Customers" or "Reserve [14] for Bad Debts" accounts (Shelton, Tr. 41–42; Rowe, Tr. 588; Owen, Tr. 675–76, 686). The actual effect, if any, of these bookkeeping entries on divisional or corporate income cannot be conclusively determined from the expert testimony

received. It is unnecessary to demonstrate a positive effect on income, however, since the issue in this proceeding is the effect of such transfers on consumers, rather than on Genesco's corporate income.

28. Ronald Rowe, a Commission staff accountant, testified that in his opinion, based on generally accepted accounting principles which are the standards of the accounting profession, transferring credit balances to a "reserve for bad debts" account would eventually be reflected in a division's income as of the close of that division's accounting period (Tr. 587–88, 591). Mr. Rowe further testified that closing entries would have to be made for such effect to occur, but stated that corporate auditors would normally require that such entries be made, unless the amounts under consideration were immaterial, to avoid accumulating a larger offset against accounts receivable than needed (Tr. 595–96, 723–25).

According to Mr. Rowe, if a transfer was made to a "due customers" account rather than a "reserve," no effect on the profit and loss statement of the division would occur (Tr. 599–600). Such transfer would, however, be an unusual bookkeeping entry since both affected entries are liability accounts (Tr. 600).

Mr. Rowe's testimony was based entirely on his knowledge of accounting principles and the prior testimony of Mr. Shelton (Tr. 591).

29. Larry Shelton, Vice Chairman and Chief Administrative Officer of Genesco, testified that, prior to 1974, the accounting entries made by retail divisions to transfer credit balances from customer accounts varied, but that such credits would generally have been transferred to a balance sheet account which would not have had any impact on the individual division's income or profit and loss statement (Tr. 135–36, 747). The balance sheet account used would have been a suspense account or the "reserve for bad debts" account (Tr. 135–36). Transfers to suspense accounts would, in all likelihood, eventually end up in the "reserve for bad debt" accounts. Mr. Shelton further [15] testified that at some point in a company's history an adjustment would be made to transfer excess amounts out of "reserve for bad debts" accounts (Tr. 139–140). To Mr. Shelton's knowledge, credit balance transfers during 1972–1974 were never put into a division's income (Tr. 141).

30. Robert Green, the Senior Vice President and Chief Financial Officer of Bonwit, testified that, during 1972 to 1974, Bonwit transferred credit balances from customer accounts to a "reserve for bad debts" account. Amounts so transferred remained in the reserve account and were never used in any way which would affect Bonwit's income (Tr. 696–97). It is Mr. Green's understanding, based on a

review of Bonwit's accounting practices, that no adjustment was made in Bonwit's "reserve" due to the accumulation of credit balance transfers (Tr. 706).

31. Ted Owen, the executive in charge of Interstate's accounting matters, testified that, prior to mid-1974, credit balances on Interstate's customer charge accounts were transferred to a "Due Customer" account (Tr. 675–77), 685–86). Such transfers would have had no effect on Interstate's income, according to Mr. Owen (Tr. 682).

In discussing the "reserve for bad debts" account used by the Bonwit division, Mr. Owen testified that, if transferred credit balances were not considered in arriving at the required reserve balance, such transfers would not affect company income (Tr. 677–78). Mr. Owen stated that, based on generally accepted accounting principles, there is no limitation on the length of time transfers can be retained in the reserve account (Tr. 677–79).

V. ADOPTION OF CORPORATE POLICY FOR HANDLING CREDIT BALANCES

32. A major consolidation and restructuring of Genesco was undertaken in March 1973 (CX 2B). According to the 1973 Annual Report, "new internal controls designed to strengthen the financial reporting of decentralized operations" were instituted in February 1973. Elaborating on these changes, Mr. F. M. Jarman, then Chairman and Chief Executive Officer of Genesco, stated:

> [16] New procedures and reporting relationships have been established in both accounting and auditing. One significant change was to make operating company controllers accountable to the chief accounting officer of the corporation. This gives us greater centralized control for a more effective performance reporting system. At the same time, the internal audit department is being significantly expanded to provide thorough follow-up on the accuracy of operating company financial reporting and compliance with central accounting policies. [CX 2C.]

Genesco's 1974 Annual Report under the heading "New Organization" advised stockholders that "the installation of a new organization structure designed to more clearly establish responsibility and accountability," which had previously been announced, was "completely implemented" and "working smoothly at every level" (CX 3C).

33. Mr. Shelton, Chief Administrative Officer of Genesco, testified that in 1973, as part of this reorganization effort, he instructed Mr. White, Genesco's Chief Accounting Officer, to develop a structure that would make the divisional accountants' reporting more manageable. Mr. White was also assigned the task, once control in the field had been developed, of meeting with Genesco's internal auditors and

thereafter issuing, subject to Mr. Shelton's approval, policy directives to bring about a degree of standardization in accounting practices used by the divisions (Shelton, Tr. 737–39).

34. CX 62A-B, a letter dated April 11, 1974, from an Assistant Director for Special Statutes, Bureau of Consumer Protection, addressed to the former President of Bonwit, a division of Genesco, was received to establish the date of initial contact by the Federal Trade Commission with Genesco regarding the violation alleged in this proceeding (Tr. 480). This letter states, in part:

> It has come to our attention that certain retail stores * * * as a matter of policy, delete unused credit balances * * * from open end credit accounts or other charge accounts * * * when the account remains dormant for a period of time.
>
> * * * * * * *
>
> [17] We are interested in the nature and extent of this practice. Therefore, we request that you furnish to this office details of how your business handles an unused account which reflects a credit balance over a period of time.

Thirteen items or areas of information requested are thereafter specified and Bonwit was requested to furnish such information within 30 days from receipt of the Commission's request.

35. Respondent, citing the Memoranda Initiating Investigation dated June 28, 1974 in Commission files Nos. 742 3313 (Associated Dry Goods, et al.); 742 3314 (Genesco Inc.); 742 3315 (Gimble Bros., Inc.); 742 3317 (McRory Corp., et al.); 742 3318 (Carter Hawley Hale Stores, Inc., et al.), maintains that no investigation of credit balance practices was commenced until some time after April 1974. A Memorandum Initiating Investigation is filed only after "it has been determined by preliminary investigation or otherwise, that a detailed investigation is needed or that complaint should issue, or an attempt should be made to obtain a consent order * * *" (FTC Operating Manual, Chapter 3.1). The June 28th date cited by respondent, therefore, is not relevant to reaching a determination of when respondent was apprised of the Commission's investigation of the handling of credit balances by retail stores.

36. Mr. Shelton testified that, in the late spring of 1974, Genesco's Chief Accounting Officer proposed that a corporate policy regarding the handling of credit balances by all respondent's retail operating divisions be adopted (Tr. 740). Respondent maintains this proposal was a part of the reorganization effort discussed in Finding 32 and totally unrelated to the Commission's letter of April 11, 1974.

37. After consultation with its internal auditors and the legal department, in approximately the summer of 1974, Genesco adopted

a corporate-wide policy for handling credit balances by its retail divisions (CX 89G; Shelton, Tr. 740–41). This policy provides:

> Each charge customer having a credit balance of One Dollar ($1) or more will, so long as it remains outstanding, receive a statement showing [18] credit balance for each of the six (6) immediately succeeding billing cycles. Each such statement will also notify the customer that he may request and receive a refund at anytime. If no request is made and the credit balance remains at the time the next (7th) statement would normally go out, then a check for the balance should be forwarded to the customer at that time. The check should reflect the fact that it represents payment of the credit balance or a notice should be enclosed with the check to that effect. If the size of the credit balance does not warrant six notices, the refund may be made sooner.
>
> [RX 11.]

38. As is apparent from the above cited summary of Genesco's corporate policy for handling credit balances, no provision was or has been made to notify retail customers whose credit balances were transferred from their charge accounts prior to full implementation of the current policy of their continuing right to request and receive a full refund or reinstatement of such credit balances (RX 11; Finding 21).

VI. COMPLIANCE WITH CURRENT POLICY

39. Compliance on the part of all Genesco retailing divisions with the corporate policy for handling credit balances adopted in mid-1974 was and is mandatory (CX 89G).

40. In order to insure that Genesco's current policy for handling credit balances is fully implemented by all retail divisions, internal auditors, during their auditing of individual companies, check for compliance with this policy. Any non-compliance with centrally-directed accounting procedures, such as the handling of credit balances, would be included in their audit report. To date, no deviations from this particular policy have been reported (Shelton, Tr. 749–750).

41. During the investigation incident to this proceeding, respondent became aware that an employee of the Bendel division had violated the corporate policy adopted in mid-1974 by transferring credit balances [19] from customer accounts, and had also ignored Bendel's prior policy regarding the handling of such balances. When the failure to comply with the current policy was discovered, the unidentified employee was dismissed (Shelton, Tr. 745–46, 752–53).

42. Despite Genesco's adoption of an official corporate policy in mid-1974 requiring that statements sent to customers whose accounts show a credit balance bear a legend that such credit balance exists

and that the customer may request and receive a refund of such balance at any time, billing statements used by the Bonwit division from mid-1974 through March 1975 failed to notify charge customers with an existing credit balance of this right (CX 34, 35A, 37A, 39, 40B, 41; RX 3A, 6A). Some billing statements used by the Bendel, Plymouth, Gidding/Jenny and Interstate (Guarantee) divisions, after adoption of the current policy, also failed to notify charge customers of their right to request and receive refunds of existing credit balances (CX 5B, 6A, 6B, 6C, 7C, 11C).

VII. INDUSTRY PRACTICE

43. During and prior to the early 1970's, the practice of transferring customer credit balances out of inactive accounts was widespread in the retail industry. Letters received by the Federal Trade Commission from other members of the retail industry during the preliminary investigation of credit balance practices describe practices similar to Genesco's, which were followed by many members of the industry (CX 104; RX 14–23, 26–28). Complaints issued against other members of the retail industry, and consent agreements entered as a result thereof attest to the prevalence of such credit balance practices (CX 96–103). In addition, industry witnesses called during rebuttal testified that, prior to 1971 or 1972, similar credit balance practices were followed by the companies for which they worked (Pike, Tr. 815; Drew, Tr. 852, 854; *see also,* Green, Tr. 693, and Drew, Tr. 858–861).

[20] CONCLUSIONS

A. FACTUAL SUMMARY

The complaint charges Genesco, a Tennessee corporation, with unfair acts and practices in connection with its retail divisions' handling of credit balances existing in customer charge accounts. These practices, it is alleged, caused a substantial number of Genesco's charge account customers to be deprived of substantial sums of money rightfully theirs (Complaint, ¶¶ 5, 6). Genesco had the authority to establish and monitor the allegedly unfair acts and practices of its retail divisions throughout the relevant time period, although it did not choose to exercise this authority until mid-1974 (Findings 6, 36–37).

Genesco, in addition to its other corporate endeavors, operates retail specialty apparel and footwear stores in a number of states (Finding 1). As an adjunct to such retail operations, respondent's retail divisions permit qualifying customers to charge purchases on charge account plans maintained by Genesco (Finding 4).

Occasionally these charge accounts, through return of merchandise, overpayment, or other transactions, reflected credit balances which represented an amount of money owed by respondent to its customers (Finding 8). Some such credit balances resulted from accounting errors; however, the handling of these credit balances is not challenged in the complaint (Fn., Finding 7). Likewise, credit balances subsequently credited against customer purchases or refunded are not encompassed within the category of credit balances under consideration in this proceeding.

When a credit balance was created, billing statements reflecting such balance were sent to customers by some of Genesco's retail divisions only for the billing period during which the credit balance was created and for subsequent billing periods in which activity on the account occurred (Finding 9). However, other divisions also sent billing statements to customers whose accounts reflected a credit balance during billing periods in which no activity occurred.

[21] Various notations were made on billing statements used by Genesco's retail divisions to indicate the existence of a credit balance. These notations ranged from a cryptic dash (-) or "CR" next to the account balance figure to a stamped or printed legend notifying the customer that a credit balance existed (Findings 10–13).

Prior to mid-1974, all requests for the refund of credit balances were honored (Finding 23). However, all of the billing statements used by Genesco's retail divisions during 1972–1973, and many such statements used during 1974–1975, failed to advise customers of their right to request and receive a refund of their credit balances. Additionally, these statements failed to advise charge customers that, if they took no action, such credit balances ultimately would be transferred from their account without notification to, or authorization by, the customer (Findings 15, 21).

Commencing in late 1974, some billing statements used by Genesco's retail divisions informed customers that credit balances reflected on their accounts would be refunded upon request or that such balances could be left on their accounts to reduce the amount due on future purchases. A few billing statements received in evidence which were used by respondent during 1975 also advised retail charge customers that, after a prescribed time period (*e.g.*, 6 months), outstanding credit balances would be refunded automatically (Finding 14).

Prior to the adoption in mid-1974 of a corporate policy regarding the handling of credit balances, several of Genesco's retail divisions routinely transferred such balances from customer accounts after a set period of inactivity on the account of from 6 to 18 months

(Findings 16–17). During the period 1972–1974, a total of $823,329.98 in credit balances was transferred from customer charge accounts (Finding 20). In order to accomplish transfer of a credit balance from a customer's charge account, bookkeeping entries were made by the retail divisions debiting the customer's account and crediting a corporate account with the amount of the credit balance (Finding 27). Once such transfer had been effectuated, no attempt was made to refund or reinstate such credit balances unless a specific request to do so was received from the customer (Finding 22).

[22] Variations in divisional handling of credit balances and deviations from established divisional policy occurred during the time period under consideration (Findings 17–18, 25). Such aberrational occurrences are not, however, of major significance in the context of the overall divisional practices challenged as unfair in the complaint. Also, the fact that all divisions did not transfer credit balances in the same manner or throughout the relevant time period does not preclude a determination that the handling of credit balances in the manner described by some retail divisions of Genesco constituted an unfair act or practice violative of Section 5 of the Federal Trade Commission Act.

In mid-1974, as part of a major consolidation and restructuring of Genesco, a corporate policy for the handling of credit balances of customer charge accounts for all retail divisions was adopted (Findings 36–37). This corporate policy was adopted subsequent to the receipt by Genesco of a letter from the Federal Trade Commission seeking information about the credit balance handling practices of Genesco's Bonwit division (Findings 32–37).

While the current corporate policy provides for automatic refund of all credit balances in excess of $1.00, no provision was made at the time the policy was instituted to inform customers, whose credit balances in the past had been transferred, that, by making a request, they could still obtain full refunds or reinstatement of credit balances which had been transferred from their accounts (Findings 21, 37–38).

Although compliance with the mid-1974 corporate policy was made mandatory, evidence was received indicating that some retail divisions violated such policy during 1974 and 1975 (Findings 39–42). The mid-1974 policy ostensibly followed by all Genesco divisions is not, however, in issue in the instant proceeding. At most, the current method employed by Genesco in handling credit balances and the degree of compliance therewith bear on the question of what remedy is necessary to effectively eradicate any violations found to exist.

Other members of the retail industry followed practices in respect to charge customers' credit balances similar to the practices followed

by Genesco in the pre-1974 period (Finding 43). This fact, however, does not preclude a determination that Genesco's practices were unlawful. [23]

B. RESPONDENT'S CREDIT BALANCE ACTS AND PRACTICES WERE PROHIBITED BY SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

As a consequence of stipulations as to the credit balance practices followed by many of Genesco's retail divisions prior to 1974, and receipt into evidence of numerous billing statements used by respondent which demonstrate the form of notice provided charge customers with credit balances, no controlling factual issues are in dispute. Respondent has conceded that, in many of its retail divisions' normal course of dealing with charge customers, substantial sums of money in the form of credit balances were transferred from customers' accounts to corporate accounts without notice to or authorization by the customer.

Respondent does not dispute facts showing that its retail divisions failed to send charge customers with credit balances periodic billing statements apprising them of the existence of such balances, failed to inform such customers of their continuing right to request and receive a refund before or after transfer of a credit balance from their charge account had been effected, and failed to advise charge customers that credit balances, without notice, would be routinely transferred from charge accounts after periods of inactivity.

Given this factual consensus, the critical determination necessary to decide if a violation has occurred is whether respondent's conduct constitutes an unfair act or practice in commerce prohibited by Section 5 of the Federal Trade Commission Act. As has repeatedly been noted in judicial opinions addressing the question of "fairness," Congress intentionally refrained from explicitly deliniating the acts or practices prohibited, choosing instead to delegate to the Commission the power to "give definition and content to the term 'unfair practices.' " *Pfizer Inc.*, 81 F.T.C. 23, 60 (1972); *see also, Federal Trade Commission* v. *Standard Education Society,* 86 F.2d 692, 696 (2d Cir. 1936), *rev'd on other grounds,* 302 U.S. 112 (1937); *Federal Trade Commission* v. *Brown Shoe Co.*, 384 U.S. 316, 320–21 (1966).

[24] While the concept of fairness enunciated in Section 5 may be elusive, the Commission has enumerated the factors which should be considered in determining whether a practice not otherwise prohibited as deceptive or violative of antitrust laws is nonetheless unfair. These criteria were repeated in a footnote to the Supreme Court's

opinion in *Federal Trade Commission* v. *Sperry and Hutchinson Co.*, 405 U.S. 233, 244–245 (1972), as follows:

> (1) whether the practices, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous, (3) whether it causes substantial injury to consumers (or competitors or other businessmen). "Statement of Basis and Purposes of Trade Regulation Rule 408 [Unfair or Deceptive Advertising and Labelling of Cigarettes in Relation to the Health Hazards of Smoking]." 29 Fed. Reg. 8324, 8355 (1964).

Although initially some question as to the scope of Congress' delegation existed, it is now clear that the Commission's jurisdiction in dealing with unfair commercial practices is not limited to activities which violate the common law or other criminal or antitrust statutes. The Commission, in the exercise of its delegated authority under Section 5, may, in the public interest, prohibit as "unfair" acts or practices which have severe adverse effects on consumers despite their seemingly technical legality. *Spiegel, Inc.* v. *Federal Trade Commission,* [Trade Reg. Rep. ¶ 61,006, at 69,450 (1976–2 Trade Cases)]; *Federal Trade Commission* v. *Sperry and Hutchinson Co., supra,* at 239; *All-State Industries of North Carolina,* 75 F.T.C. 465, 490–494 (1969), *aff'd,* 423 F.2d 423 (4th Cir. 1970), *cert denied,* 400 U.S. 828 (1970).

A recent Commission decision, *Beneficial Corp.,* CCH [1973–1976 Transfer Binder] Trade Reg. Rep. ¶ 20,959, at 20,820 [86 F.T.C. 119], *enforced in part and vacated and remanded as to scope of order,* No. 75–2102 (3rd Cir. Sept. 8, 1976), summarized the fairness issues properly within the scope of Section 5 as follows: [25]

> There is no doubt at this point that the Commission may adapt the substance of Section 5 to changing forms of commercial unfairness, and is not limited to vicariously enforcing other law. * * * [T]hose who engage in commercial conduct which is contrary to a generally recognized public value are violating the Federal Trade Commission Act, notwithstanding that no other specific statutory strictures apply.

See also, Federal Trade Commission v. *R. F. Keppel & Bro., Inc.,* 291

U.S. 304, 313 (1934); *Federal Trade Commission* v. *Sperry and Hutchinson Co., supra; Pfizer Inc., supra.*

No attempt was made, either in the complaint or during adjudication, to bring respondent's credit balance practices within any specific common law or statutory prohibition. This, however, does not preclude a determination that Genesco's activities were unlawful. The Commission, in fulfilling its responsibility to develop a progressive and evolutionary definition of "unfairness" under Section 5, may hold that respondent's credit balance practices were "contrary to a generally recognized public value" resulting in substantial harm to consumers and were, therefore, unfair acts and practices within the prohibition of this Section.

Applying the broad standard set forth in *Sperry and Hutchinson Co., supra,* in analyzing respondent's credit balance practices, the conclusion that such practices are unfair, and thus unlawful, is inevitable. To unilaterally deprive charge customers of credit balances due them without any prior or contemporaneous notice of respondent's transfer practices is abhorrent to all generally recognized concepts of marketplace fairness. The fact that such balances might subsequently be refunded upon request does not serve to purge this practice of its inherent unfairness since the likelihood that subsequent requests for refunds will be made is diminshed, if not eliminated, by respondent's failure to send periodic notices of credit balances to charge customers and its failure to disclose their continuing right to request and receive refunds of such balances.

Absent a clear notification and understanding to the contrary, respondent's charge customers were entitled to expect that their credit balances would be retained [26] in their accounts to be offset against future purchases, or ultimately refunded to them. Respondent's practices of transferring out credit balances without notice preyed on the vulnerability of its charge customers. This omission of material facts not only makes respondent's credit balance practices palpably unfair, but also deceptive.

Respondent clearly has a general commercial duty to disclose to its charge customers all material facts relating to the handling of credit balances which may exist in their accounts. *Beneficial Corp., supra,* at 20,821. The "general commercial duty to disclose material facts" noted in the *Beneficial* decision is not unique. By analogy, the rationale requiring full disclosure of material facts in advertising and contract cases also supports the conclusion that Genesco had an affirmative duty to fully disclose all aspects of its credit balance

practices to its charge customers. *Pfizer Inc., supra,* at 60–63; *All-State Industries of North Carolina, Inc., supra,* at 489–490.[5]

Official recognition of the importance of full disclosure of material facts in credit transactions was taken by Congress in its enactment in 1968 of the Consumer Credit Protection Act (Pub. Law 90–321, 90th Cong., May 29, 1968). Regulations promulgated under this Act and amended through October 28, 1975 (12 C.F.R. 226) have reiterated the necessity of such disclosure in credit transactions. The stated purpose of a part of these regulations is "to assist the customer to resolve credit billing disputes in a fair and timely manner, to regulate certain billing and credit card practices, and to strengthen the legal rights of consumers." (12 C.F.R. 226, 226.1; see also, Sections 226.6–226.7.)

[27] Respondent has advanced no persuasive commercial or other justification which would lessen its duty to fully inform charge customers of its credit balance practices. The fact that other members of the retail industry employed similar practices does not exonerate respondent of its failure to make full disclosure to its charge customers. *Peacock Buick, Inc.,* CCH [1973–1976 Transfer Binder] Trade Reg. Rep. ¶ 21,083, at fn. 12, p. 20,951 [86 F.T.C. 1532 at 1563]. Whether or not credit balance transfers had an immediate impact on respondent's income also does not, as respondent maintains, mitigate the unfairness inherent in the failure to disclose to charge customers Genesco's credit balance practices.

The final criteria cited by the Commission for consideration in determining whether a given trade practice is unfair — *i.e.,* substantial injury to consumers — is the unavoidable consequence of respondent's credit balance practices. Over three-quarters of a million dollars were transferred from charge customers' accounts by Genesco's retail divisions during 1972–1974. Although an unspecified portion of this amount could reflect credit balances which were never actually due the customer or which were subsequently refunded, the fact remains that a significant number of charge customers were deprived of substantial funds rightly theirs as a direct result of Genesco's credit balance practices.

Since respondent's credit balance practices were unfair, deceptive and caused substantial harm to consumers, it must be concluded that a violation of Section 5 of the Federal Trade Commission Act has occurred.

[5] "The law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it." W. Prosser, *Law of Torts* 698 (4th Ed. 1971). See also, *Affiliated Ute Citizens of Utah, et al.* v. *United States,* 406 U.S. 128, 153–154 (1972).

C. RESPONDENT'S ADOPTION OF A CORPORATE POLICY FOR HANDLING CREDIT BALANCES DOES NOT RENDER THIS ADJUDICATION MOOT

Respondent, in asserting that this matter is moot, maintains that the corporate policy voluntarily adopted in mid-1974, mandating automatic refunds of credit balances after a prescribed period of inactivity and providing for monthly billing statements to charge customers with existing credit balances, comports fully with the [28] requirements of Section 5 of the Act and the major provisions of the proposed order. Respondent argues that, given this change in business policy, no legitimate purpose will be served by entering a cease and desist order.

In assessing the importance of respondent's discontinuance of the challenged credit balance practices, the voluntariness of such discontinuance must be determined. Commission decisions have repeatedly noted that:

> It is well established * * * that discontinuance of an offending practice, particularly after initiation of governmental investigation, and in circumstances where resumption is possible, does not obviate the need for, or propriety of, an order. *Spiegel, Inc.*, CCH [1973-1976 Transfer Binder] Trade Reg. Rep. § 20,985, at 20,841 (FTC 1975).

See also, *Libby-Owens Ford Glass Co.* v. *Federal Trade Commission*, 352 F.2d 415, 418 (6th Cir. 1965); *Cotherman* v. *Federal Trade Commission*, 417 F.2d 587, 594-595 (5th Cir. 1969); *Coro, Inc.* v. *Federal Trade Commission*, 338 F.2d 149 (1st Cir. 1964), *Cert. denied*, 380 U.S. 954 (1965).

Reviewing the chronology of events leading up to respondent's adoption of its 1974 corporate policy, the most reasonable conclusion is that the Commission's initiation of an investigation of the handling of credit balance practices by respondent and other members of the retail industry was the precipitating factor in respondent's adoption of its current corporate policy.

Respondent points to the change in corporate management which commenced in March of 1973 and maintains that the eventual change in corporate policy with respect to the handling of customers' credit balances was part of the corporate reorganization initiated by this management. No evidence was received which indicates the degree of management changes which occurred in 1973. The testimony of Mr. Shelton, Genesco's Vice-Chairman and Chief Administrative Officer, [29] however, revealed that the management change was essentially a redistribution of corporate power to a segment of management already existing within the organizational structure. Although the

philosophy of this management group may have differed from the controlling management group it replaced, its impact on Genesco apparently had been felt prior to March 1973. The 1973 management change, arguably, was neither as extensive nor as radical as respondent's characterization of it implies. In this regard, it should be noted that no definite steps had been taken to reform the retail divisions' practices concerning the handling of credit balances until the late spring of 1974.

Genesco's current corporate policy concerning the handling of credit balances was first recommended to top management in the late spring of 1974 and officially adopted later that year. One of respondent's retail divisions received a Commission letter of inquiry concerning credit balance practices in April 1974. It is reasonable to conclude that Genesco's top management was immediately made aware of the Federal Trade Commission's investigation by this retail division.

Given this sequence of events, the most logical assessment of the underlying motivation for adoption of the 1974 corporate policy is that "Respondent stopped violating the law when it learned that the law's hand was already on its shoulder." *Coro, Inc.*, 63 F.T.C. 1164, 1201. Certainly, Genesco's change of corporate policy cannot be viewed as being born of spontaneous recognition of the error of its ways. Since Genesco's discontinuance of the challenged practices was not entirely voluntary or self-initiated, a cease and desist order may properly be entered. *Galter* v. *Federal Trade Commission*, 186 F.2d 810, 812-813 (7th Cir. 1951), *cert. denied*, 342 U.S. 818 (1951); *Coro, Inc.* v. *Federal Trade Commission, supra; Beneficial Corp., supra*, at 20,822.

Respondent, relying on *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F.2d 321, 331 (7th Cir. 1944), *cert. denied*, 323 U.S. 730 (1944) and subsequent Commission decisions, asserts that, even if discontinuance was not entirely voluntary, Genesco's current policy concerning credit balances fully comports with the requirements of Section 5 of the Federal Trade Commission Act and, therefore, no purpose will be served by entering a cease and desist order at this juncture.

[30] As discussed in the previous Section of this opinion, respondent's current corporate policy provides prospectively for automatic refunds of credit balances and periodic notices to customers of the existence of such balances. This policy, however, makes no provision for notification to charge customers who, unknowingly, already have had credit balances transferred from their accounts. Respondent claims an abiding intention to refund the full amount of any credit

balance previously transferred from a customer account if a request to do so is received from the customer, but denies that there exists any necessity to notify customers of this intention. Respondent's continuing violation, which the current corporate policy does not remedy, is the failure to inform charge customers that credit balances have been transferred from their accounts and that such balances will be refunded on request. In order to insure that charge customers are fully advised of respondent's willingness to refund any credit balance which has been transferred from their accounts, a cease and desist order must issue.

Since the mid-1974 change in corporate policy, some Genesco divisions failed to adhere to, or abide by, said policy. At a minimum, the record shows that some of respondent's divisions were very dilatory, or careless, in implementing the policy. A cease and desist order must also be entered to ensure the avowed corporate policy is fully implemented by all retail divisions.

As a corollary to respondent's argument that the current corporate policy comports fully with Section 5 of the Federal Trade Commission Act and this adjudication is therefore moot, respondent cites a recent change in prevailing industry practices and the enactment since 1975 of several state laws and federal regulations which would make resumption of the violative practices unlikely. In arguing that the instant proceeding is moot, respondent bears the heavy burden of demonstrating that "there is no reasonable expectation that the wrong will be repeated." *United States* v. *Aluminum Co. of America,* 148 F.2d 416, 448 (2d Cir. 1945); *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 633 (1953); *Rubbermaid, Inc.,* CCH [1973-1976 Transfer Binder] ¶ 21,131 at 20,986 (FTC 1976). Respondent has not met this burden.

[31] Just as similar credit practices by members of the retail industry would not exonerate respondent of its violation of Section 5 *(Peacock Buick, Inc., supra,* at 20,951), recent changes in industry practices concerning the handling of customer credit balances does not prevent respondent from persisting in its failure to give adequate notice of its refund policy to charge customers who have already had balances transferred from their accounts. Likewise, practices followed by competitors would not preclude respondent from a resumption of their violative practices.

The recent enactment of state laws and federal regulations cited by respondent as evidence that violative practices will not be resumed is also unpersuasive. Although such enactments reach some activities challenged in this proceeding, *e.g.,* failure to send periodic billing statements to charge customers with credit balances, other activities,

e.g., transfer of credit balances, would remain unrestrained if an order is not entered.

Based on the discussion set forth above, no basis exists for holding this adjudication moot.

D. THE ORDER ENTERED HEREIN IS WITHIN THE COMMISSION'S AUTHORITY AND IS NECESSARY TO FULLY REMEDY THE VIOLATIONS FOUND

Having determined that respondent has violated, and is violating, Section 5 of the Federal Trade Commission Act in handling credit balances of charge customers, the Commission has wide discretion in fashioning whatever order is necessary to insure the cessation of such unfair acts and practices. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428–430 (1957); *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611 (1946); *Viviano Macaroni Co.* v. *Federal Trade Commission*, 411 F.2d 255, 260 (3d Cir. 1969). In addition to prohibiting future violative acts, the Commission may, where necessary, impose affirmative duties upon a respondent if such duties are an integral part of the remedy needed to fully remedy the violations found or their continuing effects. *Federal Trade Commission* v. *National Lead Co., supra*, at 430; *Windsor Distribution Co.* v. *Federal Trade Commission*, 437 F.2d 443, 444 (3d Cir. 1971). Courts will not interfere [32] with such orders so long as a reasonable relationship between the remedy and the unlawful practice is found to exist. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394–95 (1965); *Federal Trade Commission* v. *National Lead Co., supra*, at 429; *Federal Trade Commission* v. *Rubbermaid Co.*, 343 U.S. 470, 475 (1952).

Paragraph I of the order is, substantially, a formalization of what respondent asserts is its current policy. Periodic billing statements are ordered to be sent to all charge customers with credit balances in their accounts, informing such customers of the amounts of such balances and of their right to receive an immediate refund upon request or an automatic refund, without request, after six months. Respondent has insisted throughout this proceeding that the provisions included within Paragraph I are unnecessary since the 1974 corporate policy provides identical consumer treatment. However, billing statements used by some of Genesco's retail divisions after adoption of the corporate policy did not contain the disclosures mandated by said policy. The clarification provided by the order will serve to eradicate such non-conformity in the future.

Additionally, the order provides that charge customers must be informed of the manner in which a request for an immediate refund

may be made, *i.e.*, by returning the statement reflecting a credit balance to the store in person or by mail. The corporate policy does not prescribe such a method nor does it require notification of such method to charge customers.

In order to cure respondent's continuing failure to notify charge customers of their continuing right to request and receive a refund of credit balances which have been transferred from their accounts, Paragraph IIA of the order requires that notice be sent to all charge customers who had credit balances transferred from their accounts during the period January 1, 1972 to March 11, 1975 (the date the complaint herein issued), and who have not received a refund or reinstatement of such balance of their continuing right to request and receive a cash refund. Paragraph IIB provides that all refund requests generated by the required notice are to be treated in accord with respondent's current credit balance policy. Respondent, however, is given [33] the option by this provision of making either cash or credit certificate refunds.

Respondent has taken the position that any order provision requiring the refund of credit balances transferred prior to March 11, 1975 would be improper. Relying on *Heater* v. *Federal Trade Commission,* 503 F.2d 321 (9th Cir. 1974), respondent maintains that the Commission lacks the power to order restitution in the form of a refund of previously transferred credit balances in the instant proceeding.

Since the order entered in this proceeding does not order restitution, it is unnecessary to resolve the issue of the Commission's restitutionary powers. It should be noted, however, that the Commission is not totally devoid of such power.[6] As the Senate Committee on Commerce Report on the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act noted,

> * * * there is no intent on the part of the Committee to disturb the Commission's power to compel restitution by its own order when such restitution is necessary to terminate a continuing violation of section 5 of the Federal Trade Commission Act.
>
> S. Rep. No. 93-151, 93d Cong., 1st Sess. 28 (1973) (conference report).

This comment supports the position that, given the continuing violation present in the instant proceeding, the Commission, in fashioning an effective order, could order restitution.

A thorough reading of the order entered herewith discloses that restitution, although proper, has not been ordered. Respondent has insisted that the credit balances in issue were transferred to

[6] The Commission has specifically stated that it does not agree with the holding of the *Heater* decision. *Holiday Magic, Inc.*, 85 F.T.C. 90 (1975).

corporate accounts, which had no effect on income, where they are held for ultimate refund should such a request be received. (Respondent's Proposed Findings 22, 39, 45–48; Respondent's [34] Post-Trial Memorandum, pp. 15, 20; Respondent's Post-Trial Reply Memorandum, p. 13.) Additionally, it has always been respondent's asserted policy to honor all valid requests for reinstatement or refund of transferred credit balances. (CX 89G; Respondent's Proposed Findings 23, 40; Respondent's Post-Trial Memorandum, p. 19.) The order provision dealing with transferred credit balances requires only that charge customers be advised of their credit balance and of respondent's continuing refund policy and the form a request for such refund should take.

Respondent insists that this notification requirement is oppressive and burdensome due to the difficulty inherent in compiling lists of affected charge customers from the retail divisions' accounting records. Lists of affected charge customers for some retail divisions were received into evidence during the course of this adjudication (CX 14, 28). Although some difficulty might be encountered in compiling the additional lists necessary to comply with the order, such difficulty does not relieve respondent of its duty to comply with the law, *i.e.*, to provide adequate notice to charge customers of their continuing right to request and to receive refunds of credit balances rightfully due them but unilaterally transferred from their accounts and now held by respondent.

Finally, Paragraph VI mandates that respondent maintain, for a period of three (3) years, records of customers who receive an automatic refund of a credit balance and of customers who request and are refused a credit balance refund, together with the reason for such refusal. The additional burden imposed by this provision will be slight indeed; at most, it will be an accumulation of records which must be created in complying with other provisions of the order. The Commission has for several years included record-keeping provisions in its orders to enable compliance checks to be made, and a three (3) year period is a reasonable requirement (see *Carpets "R" Us, Inc.*, Dkt. 8947, Initial Decision January 10, 1975; Commission Opinion February 26, 1976, CCH [1973–1976 Transfer Binder] Trade Reg. Rep. ¶ 21,108, at 20,969 [87 F.T.C. 303].

All provisions of the order entered herewith are directed at, and reasonably related to, acts and [35] practices found to be unlawful and are necessary to prevent such violations in the future and to insure compliance therewith. Accordingly, the order is well within the authority of the Commission and is therefore an appropriate remedy in this proceeding.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over respondent and the subject matter of this proceeding.

2. Respondent Genesco Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal office and place of business at 111 - 7th Ave., North, Nashville, Tennessee. Respondent Genesco Incorporated sells and distributes merchandise in commerce and, through its retail divisions, operates retail specialty apparel and footwear stores in a number of states.

3. At all times relevant hereto, Genesco Incorporated has had authority to control the policies, acts and practices of its retail divisions in the handling of customer charge accounts.

4. The challenged acts and practices of respondent in connection with the handling of credit balances on charge accounts of its retail divisions' customers were, and are, unfair and deceptive. They had and now have the capacity and tendency to cause a substantial number of respondent's charge account customers to be deprived of substantial sums of money rightfully theirs.

5. These acts and practices of respondent were and are to the prejudice and injury of the public and constituted, and now constitute, unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

6. The order entered herewith is proper in scope and is reasonably related to the violations charged in the complaint.

[36] ORDER

I

It is ordered, That respondent Genesco Incorporated, a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on retail consumer open and credit accounts or other retail consumer charge accounts created incident to the business of selling consumer merchandise and services at retail, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall:

A. Mail or deliver to each charge account customer having a credit balance in excess of one dollar ($1.00) created after the date of service of this order a periodic statement each billing period following the creation of the credit balance, clearly setting forth such

credit balance; *provided, however,* that no periodic statement need be sent once a credit balance is refunded or a fully offsetting purchase is made.

[37] B. Notify each charge account customer having a credit balance created after the date of service of this order of the customer's right to request and receive a cash refund in the amount of such credit balance, such notice to be accomplished by a clear and conspicuous disclosure on or enclosed with each periodic statement required by Paragraph IA and accompanied by a return envelope, if it is the customary practice of the division or unit to accompany periodic billing statements with return envelopes. Such first disclosure shall in all material respects be consistent with, but need not be identical to, the following:

NO PAYMENT REQUIRED

The Credit Balance shown on the enclosed statement represents money we owe you. You may obtain a refund by presenting (your) (this) statement at our store or by returning it in the enclosed envelope. If you do not charge against [38] this credit or request a refund, a check will be mailed to you within six (6) months. A credit balance of $1 or less will not be refunded unless specifically requested, and it will not be credited against future purchases after expiration of a six (6) month period.

Each subsequent periodic statement issued thereafter shall be identical in all respects to the first such statement except that each must show the time in months remaining before the refund or a credit against future purchases will be made. *Provided, however,* if respondent refunds without request credit balances of one dollar ($1.00) or less, and credit amounts under one dollar ($1.00) against future purchases, the disclosure may be amended to accurately reflect this practice.

The disclosure furnished in compliance with this paragraph shall not provide any additional information relating to credit balances, shall be set forth separately from any other written matter, and shall be made either entirely on the face of the periodic statement, or entirely on the reverse side of the periodic statement, or entirely on one side of a separate page. In the event such disclosure [39] is not on the face of the periodic statement, then the periodic statement shall state clearly and conspicuously on its face: "Credit balance. Do not pay. For refund see (enclosed instructions) OR (reverse side)."

C. Refund to each charge account customer with a credit balance of more than one dollar ($1.00) created after the date of service of this order the full amount of said credit balance no later than thirty-one (31) days from the end of the sixth consecutive month during which a

credit balance exists and the customer neither transacts any business on the account nor requests a refund, unless such credit balance is not in fact owed to the customer.

II

It is further ordered, That respondent shall:

A. Within ninety (90) days after service [40] of this order notify each charge account customer whose credit balance was transferred from the customer's account at any time within the period January 1, 1972 to the issuance of the complaint herein on March 11, 1975, which credit balance has not been refunded to the customer as of the date of service of this order or the customer has not made a fully offsetting purchase as of the date of service of this order, of the amount of the credit balance that was transferred and of the customer's right to request and receive a cash refund in the amount of such credit balance, unless such credit balance is not in fact owed to the customer.

B. Refund to each charge account customer required to be notified by respondent of a credit balance pursuant to Paragraph IIA, who requests a refund, the full amount of such credit balance; [41] *provided, however,* that nothing contained herein shall prevent respondent from making such refund by giving a credit certificate(s), in the full amount of the credit balance which shall be redeemable, at the customer's option, in merchandise or cash. Such a certificate(s) or an accompanying notice attached to the certificate, shall clearly and conspicuously disclose that it is redeemable for cash if the customer so requests in person or if the customer returns the certificate(s) by mail with a request for cash redemption. Respondent shall comply with the provisions of this paragraph no later than thirty (30) days after receipt of a request for a refund from a customer.

III

It is further ordered, That each refund required to be made by this order shall be given to the customer either in person or by mailing a check (or credit [42] certificate(s) in the case of credit balances existing prior to the issuance of the complaint herein) payable to the order of the customer, to the last known address shown in respondent's records for said customer. Each periodic statement sent pursuant to the terms of this order shall be mailed to the customer at the last known address shown in respondent's records for said customer. In the event that any such statement or check is returned to respondent with a notification to the effect that the customer to

whom it was mailed is not located at the address to which it was sent, respondent shall remail the check or statement (or credit certificate) with an address correction request to the Post Office. For each check or statement (or credit certificate) in an amount of twenty-five dollars ($25.00) or more which has been remailed and is returned to respondent, respondent shall then obtain from a credit bureau the most current address available for the customer by means of an in-file report or other report on information then existing in the credit bureau's file. If a new address is obtained, respondent shall remail the check or statement (or credit certificate) to the customer at such address. For all customers whose credit balances were created prior to issuance [43] of the complaint herein, and have not been located by any of the preceding methods, respondent shall have no further obligation under this order. For all customers whose credit balances have been created after service of this order, and have not been located by any of the preceding methods, respondent shall retain or reinstate the full amount of the credit balance on the customer's account, to remain thereon for one year from the date on which the remailed check or statement was returned so that offsetting purchases can be made, and respondent shall be relieved of any further obligation to send any additional notice and/or any refund with respect to the credit balance in question. *Provided, however,* that, in the event said customer should subsequently request a refund of any such credit balance, respondent shall treat such request in the manner provided in Paragraph IIB.

IV

It is further ordered, That a credit balance shall be deemed to be created at the end of the billing cycle in which the credit balance is first recorded on a customer's account and at the end of the billing cycle in which the recorded amount of an existing credit [44] balance is changed due to a customer's use of the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such charge shall automatically be terminated and replaced by its obligations under this order with respect to the new credit balance created by said change.

V

It is further ordered, That, notwithstanding the foregoing, the provisions of this order shall not be applicable to credit balances on

accounts administered by third parties or to transactions arising out of lay-away plans or installment sales contracts.

VI

It is further ordered, That respondent shall maintain a list for each of its retail operating divisions which contains the following data: name and address of each customer who received an automatic refund of a credit balance; the date the credit balance was created and the date it was refunded; and the amount of the credit balance. Respondent shall also maintain for each such division a separate list which contains the following data: the names and addresses of all customers who [45] requested in person or by mail a refund of a credit balance but whose request was refused; the date the request was made; the date a refusal was sent to the customer; the amount of the credit balance; a copy of any written explanation of reason for the refusal sent to the customer; and, if no written explanation for the refusal was made, a statement of the reasons for the refusal.

VII

It is further ordered, That respondent shall retain the records required to be maintained by Paragraph VI of this order for a period of three (3) years and, upon request, produce said records for the purpose of examination and copying by representatives of the Federal Trade Commission.

VIII

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its retail operating divisions.

IX

It is further ordered, That respondent notify the [46] Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

X

It is further ordered, That respondent shall, within one hundred twenty (120) days after entry of this order, file with the Commission a

report in writing setting forth in detail the manner and form in which it has complied with this order.

[1] FINAL ORDER

Both complaint counsel and respondent filed notices of an intention to appeal the initial decision, but filed a "Joint Motion to Withdraw Notices of Appeal" on February 7, 1977, while requesting the Commission to stay further proceedings pending consideration of a proposed order jointly submitted by the parties in lieu of the order recommended by the administrative law judge. The Commission has elected to treat this matter as an unappealed initial decision, and has placed this matter on its own docket for review of the limited question of the appropriateness of the order recommended by the administrative law judge, in conformity with Sections 3.51(a) and 3.54 of its Rules.

In response to the Commission's request for clarification of the parties' intentions, the respondent in a letter of March 3, 1977, advised us that it

> would have no objection to * * * the Commission adopting the proposed order submitted by the parties and, in the event findings of fact and conclusions of law were deemed necessary and appropriate, adopting those set forth by the Administrative Law Judge in his initial decision.

[2] Such findings and conclusions are indeed necessary and appropriate under the Commission's Rules. We therefore accept respondent's offer and, pursuant to Section 3.51(a) of our Rules, "the initial decision shall become the decision of the Commission."

We also accept and hereby enter the jointly proposed order, which differs from the law judge's proposed order in several respects. These differences are described in complaint counsel's memorandum of February 7, 1977, in support of the "Joint Motion to Withdraw Notices of Appeal." We attach that memorandum as an appendix to this Final Order, since there is no need to repeat that analysis here.

This matter having been docketed for review by the Commission for the limited purpose of considering the appropriateness of the order recommended by the administrative law judge in his initial decision, and the Commission having considered the modifications of that order proposed by respondent and complaint counsel in their "Joint Motion to Withdraw Notices of Appeal" from the initial decision, and the Commission having concluded that the proposed modifications would be in the public interest:

It is ordered, That pages 1-35 of the initial decision be, and they

hereby are, the Findings of Fact and Conclusions of Law of the Commission.[1]

It is further ordered, That the following Final Order to cease and desist be entered, to become effective on the date of service.

ORDER

I

It is ordered, That respondent Genesco Incorporated, a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on retail consumer open end credit accounts or other retail consumer charge accounts created incident to the business of selling consumer merchandise and services at retail, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall:

[3] A. Mail or deliver to each charge account customer having a credit balance in excess of one dollar ($1.00) created after or existing as of the date of service of this order a periodic statement each billing period following the creation of the credit balance, clearly setting forth such credit balance; *provided, however,* that no periodic statement need be sent once a credit balance is refunded or a fully offsetting purchase is made.

B. Notify each charge account customer having a credit balance created after the date of service of this order of the customer's right to request and receive a refund in the amount of such credit balance, such notice to be accomplished by a clear and conspicuous disclosure on or enclosed with each periodic statement required by Paragraph IA and accompanied by a return envelope, if it is the customary practice of the division or unit to accompany periodic billing statements with return envelopes. Such first disclosure shall in all material respects be consistent with, but need not be identical to, the following:

NO PAYMENT REQUIRED

The Credit Balance shown on the enclosed statement represents money we owe you. You may obtain a refund by presenting (your) (this) statement at our store or by returning it in the enclosed envelope. If you do not charge against this credit or request a refund, a check will be mailed to you within six (6)

[1] With the proviso that "Temmessee" be modified to read "Tennessee" in the third line of the law judge's second "Conclusion of Law." [p. 35]

months. A credit balance of $1 or less will not be refunded unless specifically requested, and it will not be credited against future purchases after expiration of a six (6) month period.

Each subsequent periodic statement issued thereafter shall be identical in all respects to the first such statement except that each must show the time in months remaining before the refund or a credit against future purchases will be made. *Provided, however,* if respondent refunds without request credit balances of [4] one dollar ($1.00) or less, and credit amounts under one dollar ($1.00) against future purchases, the disclosure may be amended to accurately reflect this practice.

The disclosure furnished in compliance with this paragraph shall not provide any additional information relating to credit balances, shall be set forth separately from any other written matter, and shall be made either entirely on the face of the periodic statement, or entirely on the reverse side of the periodic statement, or entirely on one side of a separate page. In the event such disclosure is not on the face of the periodic statement, then the periodic statement shall state clearly and conspicuously on its face: "Credit balance. Do not pay. For refund see (enclosed instructions) OR (reverse side)."

C. Refund to each charge account customer with a credit balance of more than one dollar ($1.00) created after the date of service of this order the full amount of said credit balance no later than thirty-one (31) days from the end of the sixth consecutive month during which a credit balance exists and the customer neither transacts any business on the account nor requests a refund, unless such credit balance is not in fact owed to the customer; *provided, however,* that nothing contained in this paragraph shall prevent such a refund being made by giving a credit certificate(s) in the full amount of the credit balance which shall be redeemable, at the customer's option, in merchandise or cash. Such a certificate(s) or an accompanying notice attached to the certificate shall clearly and conspicuously disclose that it is redeemable for cash if the customer so requests in person or if the customer returns the certificate(s) by mail with a request for cash redemption.

D. Refrain from writing off or deleting or transferring any credit balance of more than one dollar ($1.00) created after the date of service of this order from a customer's account before a refund has [5] been made or the customer has made a fully offsetting purchase, unless such credit balance is not in fact owed to the customer or unless there has been compliance with Section III of this order.

II

It is further ordered, That respondent shall:

A. Within one hundred and twenty days (120) after entry of this order notify each charge account customer from whose account a credit balance of more than one dollar ($1.00) was transferred at any time within the period January 1, 1972 to the date of service of this order which credit balance has not been refunded to the customer as of the date of service of this order or the customer has not made a fully offsetting purchase as of the date of service of this order, of the amount of the credit balance that was transferred and of the customer's right to request and receive a refund in the amount of such credit balance, unless such credit balance is not in fact owed to the customer. Such notice shall contain language, which is consistent with, but not necessarily identical to, the following:

NO PAYMENT REQUIRED

> The amount shown is a credit balance in your favor as a result of a past transaction. You may obtain a refund of this balance by signing the notice and returning it in the enclosed envelope. If you do not request a reinstatement or a refund it will not be placed on your account for use against future purchases.

The notice furnished in compliance with this paragraph shall be clear and conspicuous and shall be set forth separately from any other written matter except that it should be in close conjunction with [6] the amount of such credit balance as disclosed therein. Such notice shall be accompanied by a return envelope.

B. Refund to each charge account customer, required to be notified by respondent of a credit balance pursuant to Paragraph IIA, who requests a refund, the full amount of such credit balance by check or credit certificate.

III

A. *It is further ordered,* That each refund required to be made by this order shall be given to the customer either in person or by mailing a check or credit certificate(s) payable to the order of the customer. Each check or periodic statement sent pursuant to the terms of this order and each notice sent pursuant to Paragraph IIA of this order shall be mailed to the customer at the last known address shown in respondent's records for said customer with the notation "Address Correction Requested" appropriately placed on the envelope. In the event that any such statement, check or notice reflecting a credit in the amount of ten dollars ($10.00) or more is returned to respondent by reason of the fact that the customer to whom it was

mailed is not located at the address to which it was sent, respondent shall then obtain from a credit bureau the most current address available for the customer by means of an in-file report or other report on information then existing in the credit bureau's file. If a new address is obtained, respondent shall remail the check, statement, notice or credit certificate to the customer at such address. For all customers whose credit balances were created prior to the date of service of the order herein, and have not been located by any of the preceding methods, respondent shall have no further obligation under this order. For all customers whose credit balances have been created after service of this order, and have not been located by any of the preceding methods, respondent shall retain or reinstate the full amount of the credit balance on the [7] customer's account, to remain thereon for one year from the date on which the remailed check or statement was returned so that offsetting purchases can be made, and respondent shall be relieved of any further obligation to send any additional notice and/or any refund with respect to the credit balance in question. *Provided, however,* that, in the event said customer should subsequently request a refund of any such credit balance, respondent shall treat such request in the manner provided in Paragraph IIIB.

B. When a customer requests, in person or by mail, a refund of a credit balance in any amount which had been reflected at any time on such customer's account, respondent shall, within thirty (30) days from receipt of such request, either refund the entire amount requested, if owed, or furnish the customer with an individualized written explanation, with supporting documentation, when requested and available, of the reason(s) for refusing to refund the amount requested.

IV

It is further ordered, That a credit balance shall be deemed to be created at the end of the billing cycle in which the credit balance is first recorded on a customer's account and at the end of the billing cycle in which the recorded amount of an existing credit balance is changed due to a customer's use of the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such charge shall automatically be terminated and replaced by its obligations under this order with respect to the new credit balance created by said change.

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V

It is further ordered, That, notwithstanding the foregoing, the provisions of this order shall not be applicable to credit balances on accounts administered by third parties or to transactions arising out of lay-away plans or installment sales contracts.

[8] VI

It is further ordered, That respondent shall maintain a list for each of its retail operating divisions which contains the following data: name and address of each customer who received an automatic refund of a credit balance; the date the credit balance was created and the date it was refunded; and the amount of the credit balance. Respondent shall also maintain for each such division a separate list which contains the following data: the names and addresses of all customers who requested in person or by mail a refund of a credit balance but whose request was refused; the date the request was made; the date a refusal was sent to the customer; the amount of the credit balance; a copy of any written explanation of reason for the refusal sent to the customer; and, if no written explanation for the refusal was made, a statement of the reasons for the refusal.

VII

It is further ordered, That respondent shall retain the records required to be maintained by Paragraph VI of this order for a period of three (3) years and, upon request, produce said records for the purpose of examination and copying by representatives of the Federal Trade Commission.

VIII

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its retail operating divisions.

IX

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

[9] ✕

It is further ordered, That respondent shall, within one hundred twenty (120) days after entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

AMERICAN CONSUMER SERVICE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2887. Complaint, May 23, 1977 — Decision, May 23, 1977

This consent order, among other things, requires a Carmel, Ind., buying club to cease misrepresenting and/or failing to disclose relevant information regarding benefits, shopping assistance, and savings experienced by club members; misrepresenting, in sales personnel recruitment, the size and true nature of their business, types of jobs offered, and potential earnings of sales personnel. The order further requires the firm to maintain specific files and to furnish prospective customers a 120-day cancellation period in membership agreements.

Appearances

For the Commission: *Peggy H. Summers.*

For the respondents: *Elroy H. Wolff, Sidley & Austin,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Consumer Service, Inc., a corporation, and Mark F. Thorne and Thomas P. Sheehan, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent American Consumer Service, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 101 East Carmel, Carmel, Indiana.

Respondents Mark F. Thorne and Thomas P. Sheehan are individuals and officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the buying and in the door-to-door offering for sale, sale and distribution of memberships in a shopping service. The shopping

service provides instructions, booklets, pamphlets and other literature regarding merchandise which may be purchased through the shopping service. Respondents' salesmen and/or agents prepare at the purchasers' home contracts for the purchase of such memberships in the shopping service.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents through the sale of memberships now cause, and for some time last past have caused various types of consumer products to be shipped and distributed to purchasers of such memberships from suppliers located in various States of the United States other than the state in which the sale of the membership was made. Respondents' sale of memberships have also caused the dissemination, transmittal and receipt of sales promotional materials, invoices, checks, collection notices and various other commercial documents in the course of advertising, selling, distributing and collecting payments for products sold to such membership by the shopping service or by numerous other suppliers, among and between the several States of the United States. In addition, the shopping service mails to enrolled purchasers in the State of Indiana price lists, instructions, booklets, pamphlets and other literature regarding merchandise which may be purchased through the shopping service.

Thus, respondents maintain, and at all times herein have maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the further course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of memberships in the shopping service, respondents' salesmen and/or agents utilize various types of promotional materials in conjunction with an oral sales presentation furnished by respondents and have made and are making numerous oral statements and representations to purchasers and to prospective purchasers with respect to their purpose in contacting such purchasers in their homes, the nature of the shopping service and the savings that result to members of such service.

Typical and illustrative of said statements and representations but not all inclusive thereof, are the following:

Hi, my name is _____ and I am with American Consumer Union. We are interested in having people fill out some questionnaires concerning their opinion on the high cost of living. Would you take a few minutes to help me?

We are looking for people in the area right now to write a couple of testimonial letters for us, so our offer is a special membership for people who are willing to do that.

To guarantee some savings immediately * * * and also to pay for you writing the letters, we include with your membership at no additional cost, a complete and unlimited 2 year supply of all cleaning agents.

Out of every dollar spent in the store, an average of close to 40 percent goes for markup.

We put the individual members in a position to * * * eliminate a high percentage of the retail markup.

You can save as much as 60 percent on some items.

In one year you can make up the major portion cost of the membership.

The $499 * * * most people prefer to pay for it over a period of time and let the monthly savings pay for it as they go.

How do members get things? It's quite simple.

We tell people to shop the market. To look through the stores and see the make and model number that suits them. Then, request the same make and model number from the buying service. It's delivered to the home with full manufacturer's warranties and guarantees.

We're talking about first quality name brand merchandise at low prices all the time whenever the member wants it.

I will be your personal representative and we will work very close to help you save * * * I will explain to you in detail how to use your membership so you can start saving right away.

PAR. 5. By and through the use of the above quoted statements and representations, and others of similar import and meaning not specifically set forth herein, in connection with the oral sales presentation used variously by their sales representatives, respondents have represented, and are now representing, directly or by implication, that:

(1) Respondents' sales representatives are contacting persons in their homes primarily for the purpose of conducting a survey.

(2) Respondents are offering membership in a shopping service at a special price only to those individuals who are willing to write testimonial letters.

(3) Respondents are offering a complete and unlimited two year supply of all cleaning agents to prospective purchasers of the shopping service at no additional cost.

(4) The supply of soap respondents offer prospective purchasers of the shopping service guarantees substantial savings immediately.

(5) Members of the shopping service will be able to eliminate a high percentage of retail markups and will realize substantial savings ranging up to 60 percent off of the regular retail prices of all consumer products that are made available for purchase through the shopping service.

(6) Individuals who purchase respondents' shopping service will recover the major portion of their initial investment within a year of purchase.

(7) Brand name consumer products can be purchased simply and easily through the shopping service by submitting the desired product's make and model number to the service which then delivers the product to the home.

(8) Brand name consumer products that appear in local retail stores are available all the time through the shopping service.

(9) Respondents and their sales representatives will be available after the date of sale to answer any questions and provide any help needed by members to make use of the shopping service.

PAR. 6. In truth and in fact:

(1) Respondents' sales representatives are not contacting persons in their homes primarily for the purpose of conducting a bona fide survey, but solely for the purpose of selling memberships in a shopping service.

(2) Respondents are not offering memberships in a shopping service at a special price to those individuals who are willing to write testimonial letters. The cost of the shopping service is the same for all individuals regardless of whether or not they write testimonial letters.

(3) Respondents are not offering a complete and unlimited two year supply of all cleaning agents at no additional cost to prospective purchasers of the shopping service. Respondents merely use these conditions to confuse and mislead such persons into believing that the amount of their monetary obligation to respondents does not include the cost of all merchandise obtained from respondents. In addition, the supply of cleaning agents given to individuals at the time of purchase does not last two years and to obtain additional cleaning agents members will incur additional expenses.

(4) The supply of soap respondents offer prospective purchasers of

the shopping service does not guarantee substantial savings immediately. Savings cannot be obtained until members have purchased enough products through the shopping service at a discount from the sale price of local retail stores so that the discounts they received exceed the total cost of their investment in the service.

(5) Members of the shopping service will not be able to eliminate a high percentage of retail markups and will not realize substantial savings ranging up to 60 percent off of the regular retail prices of all consumer products that are made available for purchase through the shopping service.

(6) Individuals who purchase respondents' shopping service may not recover the major portion of their initial investment within a year of purchase. Few, if any, members of American Consumer Service, Inc. have ever recovered the major portion of their purchase price.

(7) Brand name consumer products cannot be purchased simply and easily through the shopping service by submitting the desired product's make and model number to the service which then delivers the product to the home. Frequently additional information is requested by the shopping service which consumers find difficult to obtain by comparison shopping at local retail stores.

(8) Brand name consumer products that appear in local retail stores are not available all the time through the shopping service. Members are frequently informed that requested items are not available through the shopping service.

(9) Respondents and their sales representatives will not be available after the date of sale to answer any questions and provide any help needed by members to make use of the shopping service. In most cases members' attempts to call or write to respondents for information as to how to use the shopping service are ignored.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business as aforesaid, respondents, in connection with the representations set forth in Paragraphs Seven, Eight and Nine above, have failed to disclose to prospective purchasers that:

A. Some firms represented as being a source of discounts available only to members of the shopping service actually provide identical products at the same prices to all members of the general public who place orders through their mail order catalogues.

B. Shipping costs are not included in the price quoted to the

member, and purported savings achieved through the use of the service are frequently cancelled out by the cost of shipment to the member's home.

C. The contract of purchase will not be retained by the shopping service, but will be sold to a finance company.

The aforesaid failure to disclose such material facts to prospective purchasers of the shopping service has the tendency and capacity to mislead or deceive such persons with respect to the shopping service. The aforesaid material facts, if known to consumers, would be likely to affect their decision as to whether or not to purchase a membership in the shopping service.

Therefore, respondents' failure to disclose such material facts were, and are, unfair, false, misleading and deceptive.

PAR. 8. In the further course and conduct of their business and for the purpose of recruiting employees to sell their products, respondents now cause, and for some time last past have caused, advertisements for employment to appear in newspapers of general and interstate circulation. Said advertisements contain numerous statements and representations with respect to the size and nature of respondents' firm and the salaries available to employees thereof for the purpose of inducing, and which were likely to induce, directly or indirectly, the recruitment of door-to-door salesmen for the sale of respondents' memberships.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

CAN YOU EARN $100,000 NEXT YEAR? * * * For the opportunity of a lifetime with a prestige national company * * *

PART-TIME WORK $400 EXTRA * * * I can show you people here making up to $500 a week full time* * *

MAJOR CORPORATION NEEDS WOMEN

We are looking for young energetic men and women who want an exciting summer with a national super company. AMERICAN CONSUMER UNION

PAR. 9. By and through the use of the above quoted statements and representations, and others of similar import and meaning not specifically set forth herein, respondents have represented, and are now representing, directly or by implication, that:

(1) Respondents are offering positions in a major national corporation.

(2) Respondents are offering persons incomes ranging from $500 per week up to $100,000 per year.

PAR. 10. In truth and in fact:

(1) Respondents are not offering positions in a major national corporation. To the contrary, respondents are recruiting persons as door-to-door salesmen in a small newly established local corporation.

(2) Persons engaged by respondents do not receive the incomes as represented. Conditions and limitations imposed upon the receipt of the stated incomes result in few, if any, being paid the represented incomes.

Therefore, the statements and representations, as set forth in Paragraphs Eight and Nine hereof were and are false, misleading and deceptive.

PAR. 11. In the course and conduct of their business as aforesaid, and at all times mentioned herein, respondents have been, and are now, in substantial competition, in and affecting commerce, with corporations, firms and individuals, in the sale of products of the same general kind and nature as those sold by respondents.

PAR. 12. The use by respondents of aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and induced the purchase of substantial quantities of respondents' services by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the

aforesaid draft of complaint, a statement that the signing of such agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent American Consumer Service, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 101 East Carmel, Carmel, Indiana.

Respondents Mark F. Thorne and Thomas P. Sheehan are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I

DEFINITIONS

"Product line" as used in this order shall mean one of the following categories: subcompact size automobiles; compact size automobiles; intermediate size automobiles; full size automobiles; luxury automobiles; trucks; stoves-ovens; refrigerators; freezers; disposals; air conditioners; dishwashers; washers; dryers; other appliances; televisions; record players; radios; recorders; wearing apparel; pharmaceuticals; jewelry; furniture; upholstered furniture; bedding; carpeting.

"Shopping service" as used in this order shall mean any service that provides instructions, booklets, pamphlets and any other information regarding merchandise that is purportedly made available for purchase through such service at less than normal retail prices.

II

It is ordered, That respondents American Consumer Service, Inc., a corporation, its successors and assigns, and its officers, and Mark F. Thorne and Thomas P. Sheehan, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or any other device in connection with the offering for sale, sale, and distribution of any memberships in a shopping service, or the door-to-door sale or distribution of any other products or services; or in the recruitment of sales representatives for said products or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that respondents' agents, representatives or employees are visiting the homes of families for the purpose of conducting surveys or opinion polls or for any purpose other than the sale of memberships in the shopping service, or misrepresenting in any manner, the nature of any prospective customer contact or situation.

2. Representing, directly or by implication, that memberships in the shopping service are being offered at a special price only to those individuals agreeing to write testimonials, or misrepresenting in any manner the terms and conditions of membership in the shopping service.

3. Representing, directly or by implication, that any article of merchandise is being given free or as a gift, or without cost or charge, in connection with the purchase of other merchandise, unless the stated price of the merchandise required to be purchased in order to obtain said article is the same or less than the customary and usual price at which such merchandise has been sold separately by respondents for a substantial period of time in the recent and regular course of their business, provided, however, that respondents may offer other products or services as included in the cost of membership in the shopping service.

4. Representing, directly or by implication, that purchasers of memberships in a shopping service will save any stated dollar or percentage amount through use of the shopping service, unless respondents clearly and conspicuously disclose in connection with any savings representations that purchasers will not enjoy such savings until they have made enough purchases through the shopping service to result in savings that exceed the initial cost of membership in the service.

5. Representing, directly or by implication, to any prospective

purchaser of a shopping service, that members of a shopping service will be able to purchase consumer products at prices that are below the local retail selling prices of such products, unless respondents clearly and conspicuously disclose, in connection with such claims, in a written form containing the following information, and that said form shall be retained by each prospective member:

(a) The number of local purchase transactions that have been made from each said product line through the shopping service;

(b) A comparison, expressed as an average percent, by product line of the local retail selling price of consumer products with the cost of the identical consumer products purchased through the shopping service including shipping, postage, and delivery as experienced by members of the shopping service who have purchased said consumer products through the shopping service during a specified period of time; and that

(c) Savings can only be enjoyed by the member if the shopping service is used; some people never use the shopping service and never enjoy any savings as a result.

6. Failing to disclose to all prospective purchasers, prior to purchase of a membership, in complete and accurate detail, all steps necessary to purchase all products available through the shopping service by every method such products are available to be purchased, or misrepresenting in any manner the ease with which the service can be used.

7. Representing, directly or by implication, that purchasers of memberships in a shopping service have recovered or will recover their cost of joining the shopping service within any specified period of time, unless respondents clearly and conspicuously disclose in connection with such representation, that to recover the cost of joining the shopping service members will have to obtain savings on purchases that equal their cost of joining the shopping service, and the percentage of members of the shopping service who have recovered the cost of joining the shopping service within the specified period of time.

8. Misrepresenting in any manner the type or duration of advice and assistance that respondents of their sales representatives will offer to members of the shopping service.

9. Representing, directly or by implication, either orally or in writing, that:

(a) Respondents are offering employment positions in a major,

national corporation, or misrepresenting in any manner the size or nature of respondents' firm; and

(b) Individuals who reply to respondents' employment advertisements can or will receive a stated weekly or yearly income, unless the stated incomes have actually been achieved by at least 50 percent of past or current employees engaged in identical duties as those being advertised for, and such incomes are reasonably likely to be achieved by the person to whom the representation is made.

10. Failing to disclose, clearly and conspicuously, in all advertising for sales representatives, that:

(a) Respondents are recruiting persons for the sole purpose of soliciting or selling;

(b) Such soliciting or selling will be on a door-to-door basis, if such method of sale is included, to any extent, in the position for which persons are being recruited; and

(c) Compensation for persons so engaged is to be on a commission basis only, if such is the fact, or, if an income is advertised, the conditions and limitations thereto or upon the receipt of said income.

It is further ordered, That respondents shall establish a Consumer Service Representative who shall be responsible for answering inquiries from members of the shopping service with regard to the use of the service and for providing general assistance to such persons in connection with their use of the shopping service. Respondents shall employ at least one person to serve as a Consumer Service Representative and shall continue to employ at least one such person for at least one year after the date of respondents' last sale of a membership in a shopping service.

It is further ordered, That respondents disclose the following information clearly and conspicuously in all of respondents' sales presentations to prospective purchasers:

A. Membership in a shopping service is not necessary in order to make purchases from some of the mail order firms whose catalogs are made available by the shopping service to its members.

B. All orders placed through the shopping service must be paid for in advance by certified check or money order. The shopping service neither accepts nor extends credit.

C. Prospective purchasers of memberships in the shopping service will be required to sign a retail installment contract that may be assigned to a finance company if the full cost of the membership is not paid to respondents in one installment.

It is further ordered, That respondents shall accord to each member who signs a contract the right to cancel his membership within 120 days of the effective date of the membership contract. Upon notice of cancellation of a contract within 120 days of the effective date of the contract, respondents shall not receive, demand or retain more than an initial registration fee of $70.

It is further ordered, That respondents shall include in the contract in boldface type of at least ten (10) points the following provision:

CANCELLATION AND REFUND

You are free to cancel your membership at any time within 120 days of the date of this contract. You will have to pay only an initial registration fee of $70.

You may cancel the contract by mailing or delivering to American Consumer Service, Inc. a signed and dated copy of the "Notice of Cancellation" given to you at the time of purchase or by mailing or delivering to American Consumer Service, Inc. your own written letter of cancellation. Cancellation will be effective on the date of mailing. If, prior to cancellation, you have paid more than $70, the excess will be refunded to you within ten (10) business days.

It is further ordered, That respondents shall include in the contract a completed form in duplicate, which shall be attached to the contract and easily detachable, and which shall contain in boldface type of at least ten (10) points the following information:

NOTICE OF CANCELLATION

I hereby cancel this contract.

_____
(Date)

_____
Buyer's Signature

It is further ordered, That respondents, upon receipt of notice of cancellation within 120 days of the effective date of the contract, shall refund to the member all monies received in excess of $70 within ten (10) business days of receipt of the Notice of Cancellation.

It is further ordered, That the cancellation provisions of this Order shall not affect any obligation upon respondents under the Federal Trade Commission Trade Regulation Rule Concerning a Cooling-Off Period for Door-to-Door Sales.

It is further ordered, That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment. In addition, for a period of ten years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or

employment whose activities include the sale of shopping services, or of his affiliation with a new business or employment in which his own duties and responsibilities involve participation in the development of a sales presentation for use in the sale of shopping services. Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That respondents maintain at all times in the future, for a period of not less than three (3) years, complete business records to be furnished upon request to the staff of the Federal Trade Commission, relative to the manner and form of their continuing compliance with all the above terms and provisions of this order.

It is further ordered, That respondents distribute a copy of this order to all operating divisions of said corporation, and also distribute a copy of this order to all corporate officers and all of respondents' personnel, agents or representatives concerned with advertising, promotion, solicitation, sale or distribution of a shopping service by respondents and secure from each such person a signed statement acknowledging receipt of said order.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

GULF COAST BUILDERS EXCHANGE, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2888. Complaint, May 24, 1977 — Decision, May 24, 1977

This consent order, among other things, requires a Sarasota, Fla., trade association to cease entering into agreements or taking any other action which requires members and signatories to deal exclusively with association's bid depository, and imposes sanctions on those fail to do so. The order further mandates that the firm immediately reinstate those participants previously suspended.

Appearances

For the Commission: *Thomas D. Wilson, Jr.* and *Truett M. Honeycutt.*

For the respondents: *Martin A. Harkavy, Harkavy, Moxley & Mitchell,* Sarasota, Fla.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the party respondent named or designated in the caption hereof, and hereinafter more particularly named, designated, described and referred to as respondent, has violated the provisions of the Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Gulf Coast Builders Exchange, Inc. hereinafter referred to as respondent corporation or GCBE, is a non-profit corporation, organized and existing under the laws of the State of Florida, with its principal office located at 1490 First St., Sarasota, Florida.

Respondent GCBE was organized for, and serves its members as, an instrumentality which promotes cooperative activity among its member contractors, collects business data from its members and generally purports to assist them in the operation of their businesses. One of the functions of respondent GCBE is the operation of a bid depository. Said respondent GCBE'S membership represents a substantial, if not dominant, part of the construction industry contractors in the central Gulf Coast area of the State of Florida.

For the purposes of this complaint, the participants in the bid

depository operated by respondent GCBE consist of two groups: "members" and "signatories." The "members" group is composed of construction industry contractors who belong to the respondent GCBE and who generally perform general, electrical, plumbing, heating and air conditioning or roofing contracting services in Sarasota and Manatee Counties, Florida. The "members" group is entitled, among other things, to vote for the Board of Directors of the respondent corporation and to participate in, upon becoming signatory to, the bid depository operated by respondent GCBE. The "signatory" group is composed of all non-member contractors who wish to avail themselves of the bid depository service offered by respondent GCBE as hereinafter described. This group has no vote and is limited only to participation in the bid depository service.

The control, direction and management of respondent GCBE is vested in a Board of Directors elected by and from the members of said respondent corporation. The Board of Directors then elects or appoints corporate officers from among the members of the said Board of Directors. The officers of the respondent corporation include a president, a first vice president, a second vice president, a secretary and a treasurer.

PAR. 2. In the course and conduct of its business, respondent corporation has actively operated a bid depository which has aided, abetted, guided and assisted its membership in the unlawful acts and practices herein alleged. Several companies or firms which are signatories to, or members of, the bid depository of respondent corporation and which maintain their principal places of business in states other than the State of Florida submit or solicit bids through said bid depository which are, or may be, used by such companies or firms to award or be awarded building construction contracts. Furthermore, a considerable amount of the materials used in the construction that is the subject of said depository bid submissions and solicitations is shipped from various States of the United States into the State of Florida. Such activity and conduct engaged in by the membership of respondent corporation during the time periods described herein result in a constant current of trade in or affecting commerce in said services or materials between and among the various States of the United States. Accordingly, the acts and practices of the respondent corporation, including, but not limited to, the operation of said bid depository, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 3. Since at least 1974, respondent GCBE, its officers and directors, and the signatories to and members of its bid depository

have agreed to engage, and have engaged, in unfair and unlawful acts, policies and practices, the result of which is, or may be, to unlawfully hinder, restrain or destroy competition in providing electrical, plumbing, heating and air conditioning, roofing contracting, general contracting and other services related to building construction in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

Pursuant to, and in furtherance of, said agreement, respondent has engaged in the following acts, policies and practices, among others:

(1) Providing a bid service or depository which purportedly assists members and signatories of the bid depository of respondent corporation in the awarding and securing of electrical, plumbing, heating and air conditioning and roofing contracting services provided by electrical, plumbing, heating and air conditioning and roofing contractors for the benefit of participating general contractors.

Pursuant to rules and regulations which govern the operations and administration of the bid depository and which rules and regulations were formulated, approved and implemented by the Board of Directors of the respondent corporation, participating members and signatories of said respondent corporation agree to submit bids exclusively through the aforesaid bid depository, and members and signatories to said bid depository agree to receive only those bids submitted through said bid depository.

Participating electrical, plumbing, heating and air conditioning and roofing contractors who submit electrical, plumbing, heating and air conditioning and roofing contracting bids to general contractors not signatories to or members of said bid depository of respondent corporation are subject to suspension from the use of said bid depository and fine for such conduct.

Likewise, member and signatory general contractors who receive bids from electrical, plumbing, heating and air conditioning and roofing contractors not members or signatories to respondent corporation's bid depository, are subject to suspension from the use of said bid depository and fine for such conduct.

(2) Suspending from participation in the bid depository:

(a) numerous member and signatory contractors for submitting bids to non-member or non-signatory general contractors, in violation of said bid depository rules and regulations; and

(b) numerous member and signatory general contractors for awarding contracts based upon bids received from electrical, plumbing, heating and air conditioning and roofing contractors who have not submitted bids through said bid depository.

The aforesaid suspensions which have been imposed for as long as

ten years have caused, and are now causing, substantial injury to those firms laboring under said suspensions and resulting in a substantial lessening of competition and restraint of trade.

PAR. 4. The capacity and tendency of the acts, policies and practices of the respondent as alleged in Paragraph Three have been, are or may be, to unlawfully restrict, restrain, hinder and destroy competition in providing electrical, plumbing, heating and air conditioning, roofing and general contracting services in connection with building construction projects in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, within the intent and meaning of Section 5 of said Act.

PAR. 5. The policies, acts and practices of the respondent, as hereinbefore set forth, are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof and the respondent having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which if issued by the Commission would charge respondent with violation of the Federal Trade Commission Act, as amended; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint and waivers and other provisions required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, making the following jurisdictional findings, and enters the following order:

1. Respondent Gulf Coast Builders Exchange, Inc. is a non-profit

corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 1490 First St., Sarasota, Florida.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Gulf Coast Builders Exchange, Inc., its officers and directors, and the successors, assigns, agents, representatives and employees of said respondent, directly or indirectly, through any corporate or other device, or through any member of or signatory to its bid depository, in connection with the receipt, solicitation, use, submission or transmission of bids which are, or may be, employed in the awarding of building construction contracts and subcontracts, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall forthwith cease and desist from entering into, continuing, cooperating in, or carrying out, any course of action, undertaking or agreement:

1. Which requires or provides that any member, signatory, company, firm or individual that employs or uses the bid depository of respondent corporation shall receive or solicit bids from, or submit bids to, only those companies, firms or individuals that are also members, signatories or participants in said bid depository;

2. Which subjects any member, signatory, company, firm or individual that employs or uses the bid depository of respondent corporation to suspension from participation in said bid depository or fine or any other kind of sanction, or the threat thereof, for receiving or soliciting bids from, or submitting bids to, any company, firm or individual that is not a member of said respondent corporation, is not a signatory to said bid depository or that does not employ or use said bid depository;

3. (a) To suspend from participation in said bid depository, to fine or to impose any other sanction upon any member, signatory, company, firm or individual for submitting bids to any company, firm or individual that is not a member of respondent corporation, is not a signatory to said bid depository or that does not employ or use said bid depository;

(b) To suspend from participation in said bid depository, to fine or to impose any other sanction upon any member, signatory, company, firm or individual for awarding contracts based upon bids received from any company, firm or individual that is not a member of

respondent corporation, is not a signatory to said bid depository or that does not employ or use said bid depository.

It is further ordered, That respondent immediately reinstate any member, signatory, company, firm or individual suspended from participation in said bid depository, which suspension resulted from conduct engaged in by respondent which hereinafter would amount to a violation of this order.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to all present and future members, signatories, companies, firms or individuals that participate in said bid depository.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon it of this order file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

FLORIDA WEST COAST CHAPTER, NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2889. Complaint, May 24, 1977 — Decision, May 24, 1977

This consent order, among other things, requires a Tampa, Fla., building trade association to cease entering into agreements or taking any action that would require members and signatories to deal exclusively with association-operated bid depository, and would penalize participants who fail to do so. Further, the order mandates immediate reinstatement for those recalcitrant parties previously suspended from participation.

Appearances

For the Commission: *Thomas D. Wilson, Jr.*, and *Truett M. Honeycutt.*

For the respondent: *Stephen W. Sessums, Albritton, Sessums & DiDio,* Tampa, Fla.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the party respondent named or designated in the caption hereof, and hereinafter more particularly named, designated, described and referred to as respondent, has violated the provisions of the Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Florida West Coast Chapter, National Electrical Contractors Association, Inc., hereinafter referred to as respondent corporation or FWCCNECA, is a nonprofit corporation, organized and existing under the laws of the State of Florida, with its principal office located at 2103 West Cass St., Tampa, Florida.

Respondent corporation was organized for, and serves its members as, an instrumentality which promotes cooperative activity among its member electrical contractors, collects business data from its members and generally purports to assist them in the operation of their business. One of the functions of respondent corporation is the operation of a bid depository. Said respondent corporation's membership represents a substantial, if not dominant, part of the electrical

contracting services industry in the central Gulf Coast area of the State of Florida.

For purposes of this complaint, the participants in the bid depository operated by respondent corporation consist of two groups: "members" and "signatories." The "members" group is composed of electrical contractors who belong to the respondent corporation and who generally perform electrical contracting services in Hillsborough, Pinellas, Pasco and Hernando Counties, Florida. The "members" group is entitled, among other things, to vote for the Board of Directors of the respondent corporation. The "signatory" group is composed of general contractors and nonmember electrical contractors who wish to avail themselves of the bid depository service offered by the respondent corporation as hereinafter described. This group has no vote and is limited only to participation in the bid depository service.

The control, direction and management of respondent FWCCNECA is vested in a Board of Directors elected by and from the members of said respondent corporation. The Board of Directors then elects or appoints corporate officers from among the members of the respondent corporation and, in the selection of the secretary-manager and assistant manager, from outside the class of said members. The officers of this respondent corporation include a governor, president, vice president, treasurer, secretary-manager and assistant manager.

PAR. 2. In the course and conduct of its business, respondent corporation has actively operated a bid depository which has aided, abetted, guided and assisted its membership in the unlawful acts and practices herein alleged. Several companies or firms which are signatories to or members of the bid depository of respondent corporation and which maintain their principal places of business in states other than the State of Florida submit or solicit bids through said bid depository which are, or may be, used by such companies or firms to award, or be awarded, building construction contracts. Furthermore, a considerable amount of the materials used in the construction that is the subject of said depository bid submissions and solicitations is shipped from various States of the United States into the State of Florida. Such activity and conduct engaged in by the membership of respondent corporation during the time period described herein result in a constant current of trade in or affecting commerce in said services or materials between and among the various States of the United States. Accordingly, the acts and practices of the respondent corporation, including, but not limited to, the operation of said bid depository, are in or affect commerce, as

"commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 3. Since at least 1973, respondent FWCCNECA, its officers and directors, and the members of and signatories to its bid depository have conspired to engage, and have engaged, in unfair and unlawful acts, policies and practices, the result of which is, or may be, to unlawfully hinder, restrain or destroy competition in providing electrical contracting, general contracting and other services related to building construction in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

Pursuant to, and in furtherance of, said conspiracy, said respondent has engaged in the following acts, policies and practices, among others:

(1) Providing a bid service or depository which purportedly assists members and signatories of the bid depository of respondent corporation in the awarding and securing of electrical contracting services provided by participating electrical contractors for the benefit of participating general contractors.

Pursuant to rules and regulations which govern the operation and administration of the bid depository and which rules and regulations were formulated, approved and implemented by the Board of Directors of the respondent corporation, participating members of said respondent corporation agree to submit bids exclusively through the aforesaid bid depository, and signatories to said bid depository agree to receive only those bids submitted through said bid depository.

Participating electrical contractors who submit electrical contracting bids to general contractors not signatories to said bid depository of respondent corporation are subject to suspension from the use of said bid depository and fine for such conduct.

Likewise, signatory general contractors who receive bids from electrical contractors not members or signatories to respondent corporation's bid depository are subject to suspension from the use of said bid depository and fine for such conduct.

(2) Suspending from participation in the bid depository:

(a) numerous electrical contractors for submitting bids to nonsignatory general contractors, in violation of said bid depository rules and regulations, and

(b) numerous general contractors for awarding contracts based upon bids received from electrical contractors who have not submitted bids through said bid depository.

The aforesaid suspensions which have been imposed for as long as one year and in some cases for an indefinite duration have caused,

and are now causing, substantial injury to those firms laboring under said suspensions and resulting in a substantial lessening of competition and restraint of trade.

PAR. 4. The capacity and tendency of the acts, policies and practices of the respondent as alleged in Paragraph Three have been, are or may be, to unlawfully restrict, restrain, hinder and destroy competition in providing electrical and general contracting services in connection with building construction projects in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, within the intent and meaning of Section 5 of said Act.

PAR. 5. The policies, acts and practices of the respondent, as hereinbefore set forth, are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Florida West Coast Chapter, National Electrical

Contractors Association, Inc. is a nonprofit corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 2103 West Cass St., Tampa, Florida.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Florida West Coast Chapter, National Electrical Contractors Association, Inc., its officers and directors, and the successors, assigns, agents, representatives and employees of said respondent, directly or indirectly, through any corporate or other device, or through any member of or signatory to its bid depository, in connection with the receipt, solicitation, use, submission or transmission of bids which are, or may be, employed in the awarding of building construction contracts and subcontracts, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall forthwith cease and desist from entering into, continuing, cooperating in or carrying out any course of action, conspiracy, undertaking or agreement:

1. Which requires or provides that any member, signatory, company, firm or individual that employs or uses the bid depository of respondent corporation shall receive or solicit bids from, or submit bids to, only those companies, firms or individuals that are also members, signatories or participants in said bid depository;

2. Which subjects any member, signatory, company, firm or individual that employs or uses the bid depository of respondent corporation to suspension from participation in said bid depository or fine or any other kind of sanction, or the threat thereof, for receiving or soliciting bids from, or submitting bids to, any company, firm or individual that is not a member of said respondent corporation, is not a signatory to said bid depository or that does not employ or use said bid depository;

3. (a) To suspend from participation in said bid depository, to fine or to impose any other sanction upon any member, signatory, company, firm or individual for submitting bids to any company, firm or individual that is not a member of respondent corporation, is not a signatory to said bid depository or that does not employ or use said bid depository;

(b) To suspend from participation in said bid depository, to fine or to impose any other sanction upon any member, signatory, company, firm or individual for awarding contracts based upon bids received

from any company, firm or individual that is not a member of respondent corporation, is not a signatory to said bid depository or that does not employ or use said bid depository.

It is further ordered, That respondent immediately reinstate any member, signatory, company, firm or individual suspended from participation in said bid depository, which suspension resulted from conduct engaged in by respondent which hereinafter would amount to a violation of this order.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to all present and future members, signatories, companies, firms or individuals that participate in said bid depository.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent herein shall within sixty (60) days after service upon it of this order file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

FIVE COUNTY BUILDERS AND CONTRACTORS ASSOCIATION, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2890. Complaint, May 24, 1977 — Decision, May 24, 1977

This consent order, among other things, requires a Fort Myers, Fla., building trade association to cease entering agreement or engaging in any action that requires members and signatories to deal exclusively with association's bid depository, and impose sanctions on those parties who fail to restrict their dealings to such depository. The order further requires respondent to immediately reinstate recalcitrant participants previously suspended.

Appearances

For the Commission: *Thomas D. Wilson, Jr.* and *Truett M. Honeycutt.*

For the respondent: *John A. Noland, Henderson, Franklin, Starnes & Holt,* Fort Myers, Fla.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the party respondent named or designated in the caption hereof, and hereinafter more particularly named, designated, described and referred to as respondent, has violated the provisions of the Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Five County Builders and Contractors Association, Inc., hereinafter referred to as respondent corporation or FCBCA, is a nonprofit corporation, organized and existing under the laws of the State of Florida, with its principal office located at 2301 Fowler St., Fort Myers, Florida.

Respondent corporation was organized for, and serves its members as, an instrumentality which promotes cooperative activity among its members, collects business data from its members and generally purports to assist them in the operation of their businesses. One of the functions of respondent corporation is the operation of a bid depository. Said respondent corporation's membership, together with the membership of the bid depository of respondent corporation,

represents a substantial, if not dominant, part of the construction industry contractors in the lower and central Gulf Coast area of the State of Florida.

The membership of said bid depository consists of electrical, plumbing, heating, ventilation and air conditioning and general contractors, who perform their respective contracting services in Lee, Collier, Charlotte, Hendry and Glades Counties in the State of Florida. Members of said bid depository are entitled to, among other things, vote for the members of the bid depository committee of said respondent corporation.

The control, direction and management of the bid depository of respondent corporation is vested in a bid depository committee elected by and from the members of the said bid depository. The directives of the bid depository committee are carried out by the executive director of the respondent corporation.

PAR. 2. In the course and conduct of its business, respondent corporation has actively operated a bid depository which has aided, abetted, guided and assisted its membership in the unlawful acts and practices herein alleged. Several companies or firms which are members of the bid depository of respondent corporation and which maintain their principal places of business in states other than the State of Florida, submit or solicit bids through said bid depository which are, or may be, used by such companies or firms to award or be awarded building construction contracts. Furthermore, a considerable amount of the materials used in the construction that is the subject of said depository bid submissions and solicitations is shipped from various States of the United States into the State of Florida. Such activity and conduct engaged in by the membership of the bid depository of respondent corporation during the time periods described herein result in a constant current of trade in or affecting commerce in said services or materials between and among the various States of the United States. Accordingly, the acts and practices of the respondent corporation, including, but not limited to, the operation of said bid depository, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 3. Since at least 1973, respondent FCBCA, members of the bid depository of respondent FCBCA, officers and directors of respondent FCBCA have conspired to engage, and have engaged, in unfair and unlawful acts, policies and practices, the result of which is, or may be, to unlawfully hinder, restrain or destroy competition in providing electrical, plumbing, heating, ventilation and air conditioning, general contracting and other services related to building construc-

tion in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

Pursuant to, and in furtherance of, said conspiracy, respondent has engaged in the following acts, policies and practices, among others:

Providing a bid depository service which purportedly assists members of the bid depository of respondent corporation in the awarding and securing of electrical, plumbing, heating, ventilation and air conditioning contracting services provided by electrical, plumbing, heating, ventilation and air conditioning contractors for the benefit of general contractors.

Pursuant to rules and regulations which govern the operation and administration of the bid depository and which rules and regulations were formulated, approved and implemented by the Board of Directors of the respondent corporation, participating members of the bid depository of said respondent corporation agree to submit bids exclusively through the aforesaid bid depository, and participating members of said bid depository agree to receive only those bids submitted through said bid depository.

Participating electrical, plumbing, heating, ventilation and air conditioning contractors who submit electrical, plumbing, heating, ventilation and airconditioning bids to general contractors not members of said bid depository of respondent corporation are subject to suspension from the use of said bid depository and fine for such conduct.

Likewise, member general contractors who receive bids from electrical, plumbing, heating, ventilation and air conditioning contractors not members of respondent corporation's bid depository are subject to suspension from the use of said bid depository and fine for such conduct.

PAR. 4. The capacity and tendency of the acts, policies and practices of the respondent as alleged in Paragraph Three have been, are or may be, to unlawfully restrict, restrain, hinder and destroy competition in providing electrical, plumbing, heating, ventilation, air conditioning and general contracting services in connection with building construction projects in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, within the intent and meaning of Section 5 of said Act.

PAR. 5. The policies, acts and practices of the respondent, as hereinbefore set forth, are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint and waivers and other provisions required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent had violated the said Act and the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedures prescribed in Section 2.34 of the Rules, the Commission hereby issues its complaint, making the following jurisdictional findings, and enters the following order:

1. Respondent Five County Builders and Contractors Association, Inc. is a nonprofit corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 2301 Fowler St., Fort Myers, Florida.

2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of respondent and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Five County Builders and Contractors Association, Inc., its officers and directors, and the successors, assigns, agents, representatives and employees of said respondent, directly or indirectly, through any corporate or other device, or through any member of or signatory to its bid depository, in connection with the receipt, solicitation, use, submission or transmission of bids which are, or may be, employed in the awarding of

building construction contracts and subcontracts, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall forthwith cease and desist from entering into, continuing, cooperating in, or carrying out, any course of action, conspiracy, undertaking or agreement:

1. Which requires or provides that any member, signatory, company, firm or individual that employs or uses the bid depository of respondent corporation shall receive or solicit bids from, or submit bids to, only those companies, firms or individuals that are also members, signatories or participants in said bid depository;

2. Which subjects any company, firm or individual that employs or uses the bid depository of respondent corporation to suspension from participation in said bid depository or fine or any other kind of sanction, or the threat thereof, for receiving or soliciting bids from, or submitting bids to, any company, firm or individual that is not a member of the bid depository of said respondent corporation or that does not employ or use said bid depository;

3. (a) To suspend from participation in said bid depository, to fine or to impose any other sanction upon any company, firm or individual for submitting bids to any company, firm or individual that is not a member of the bid depository of respondent corporation or that does not employ or use said bid depository;

(b) To suspend from participation in said bid depository, to fine or to impose any other sanction upon any company, firm or individual for awarding contracts based upon bids received from any company, firm or individual that is not a member of the bid depository of respondent corporation or that does not employ or use said bid depository.

It is further ordered, That respondent immediately reinstate any company, firm or individual suspended from participation in said bid depository, which suspension resulted from conduct engaged in by respondent which hereinafter would amount to a violation of this order.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to all present and future members, signatories, companies, firms or individuals that participate in said bid depository.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

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It is further ordered, That the respondent herein shall within sixty (60) days after service upon it of this order file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

ALBANO ENTERPRISES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2891. Complaint, May 31, 1977 — Decision, May 31, 1977

This consent order, among other things, requires a Santa Ana, Calif., manufacturer and distributor of automatic gas-saver devices to cease misrepresenting the performance or efficacy of its products; that its devices will fit all engines; that these products are patented; or that they have been tested, inspected or recommended by government agencies. Further, the firm is required to substantiate all product claims; withdraw and destroy any promotional material containing false or unsubstantiated representations; make refunds to dissatisfied customers, within one year from time of product purchase; and disclose this refund policy in all advertising material. The order additionally requires the firm to maintain prescribed records; and institute a program of continued surveillance to ensure that its distributors conform to the terms of the agreement.

Appearances

For the Commission: *John M. Porter.*
For the respondents: *Edward J. Atkinson,* Los Angeles, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Albano Enterprises, Inc., a corporation, and Louis Albano, individually and as an officer of said corporation, and Joseph Albano, individually, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Albano Enterprises, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 1570 E. Edinger, Santa Ana, California.

Respondent Louis Albano is an officer of the corporate respondent. Respondent Joseph Albano is the manager of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Their address is that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been

engaged in the manufacture and distribution of so-called automobile gas saver products, which are marketed under such trade names as "Mini-Turbo Charger," "H. P. Air Injector," "Variable Combustion Meter," "V. C. Meter," "Air Jet," "Ram Jet," "Power-on-Gas-Saver," and "Air Master." These products are designed to fit between the PCV valve (positive crankcase ventilation) of the intake manifold and the carburetor. At sufficiently high engine speed, these products are purported to introduce minute additional amounts of air into the carburetor, thus allegedly creating a significantly better fuel burn by improving (increasing) the air to fuel ratio. At lower engine speeds, these products are designed to be inactive and have no effect at all.

PAR. 3. Respondents sell their products through distributors, and supply advertising materials and other promotional materials to these distributors for their use in reselling gas savers to the general public. These advertising materials and other promotional materials are disseminated to respondents' distributors located in various States of the United States, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act. Typical, but not all inclusive thereof, of such advertisements and promotional material disseminated by respondents are the following:

A. MAKE YOUR CAR AN AIR BURNER — GET AS MUCH AS 37% MORE FUEL, MORE POWERFUL FUEL OUT OF EVERY GALLON OF GAS YOU BUY

B. WITH SUPERCHARGING you increase your horsepower dramatically up to 28% more full-time firing power.

C. GAIN 2 to 6 OR MORE MILES PER GALLON.

D. SAVE UP TO 2 GALLONS OF GAS EVERY HOUR YOU DRIVE

E. HORSEPOWER INCREASE * * * Some increases: 36%, 18.75%, 55%, 43%. Test Lab-Walton's Auto Lab., Massachusetts

F. *Better Gas Mileage* * * * test result from one of the top U.S. labs. *16.7% MORE M.P.G.* test lab: Fema Corporation, CA.

G. *Less Air Pollution* * * * Percentages of Reduction: *HC* 13.74%, *Co:* 19.96%, *NOX:* 30.85%—Test Lab: Anaheim, California.

PAR. 4. At the time respondents disseminated the representations contained in advertisements and other promotional materials as alleged in Paragraph Three, respondents did not possess and rely upon a reasonable basis for making these representations. Therefore, the said advertisements and other promotional materials were and are unfair and/or deceptive.

PAR. 5. The advertisements and other promotional materials disseminated as alleged in Paragraph Three, and others substantially similar thereto represent, directly or by implication, that respondents, at the time the advertisements and other promotional materials were disseminated, possessed and relied upon a reasonable

basis for making the representations contained in the advertisements and other promotional materials.

PAR. 6. In truth and in fact, at the time respondents made the representations contained in the advertisements and other promotional materials as alleged in Paragraph Three, respondents did not possess or rely upon a reasonable basis for making such representations. Therefore, the said advertisements and other promotional representations were and are unfair and/or deceptive.

PAR. 7. In connection with advertising materials and other promotional materials regarding product efficacy supplied by respondents to distributors as alleged in Paragraph Three, respondents supply additional advertising and promotional materials to their distributors for their use in reselling gas savers to the general public. Typical, but not all inclusive thereof, of such advertisements and promotional materials disseminated by respondents are the following:

A. will fit all cars, domestic and foreign, and any truck or boat that runs on gasoline;
B. approved by the State of California;
C. an automotive device so original it was granted U.S. Patent No. 2454480 as a *BASIC* invention

PAR. 8. Through the use of the promotional representations set forth in Paragraph Seven above, and others of similar meaning and import, respondents represent directly or indirectly that their gas saver products:

A. will fit all cars, including all imported cars, and all trucks and boats which run on gasoline;

B. are "approved" by the State of California;

C. are automotive products so original they are patented as a basic invention.

PAR. 9. In truth and in fact, respondents' gas saver products:

A. will not fit all vehicles, most notably certain foreign cars and diesel engine vehicles;

B. are not approved by the State of California and in fact California law expressly prohibits the use of the term "approved" in the advertising of such products;

C. are not protected by any U.S. patent currently in effect.

PAR. 10. The advertisements and other promotional claims, as set forth in Paragraph Seven herein, therefore contain false, misleading, and deceptive statements and representations concerning respondents' gas saver products.

PAR. 11. In the course and conduct of the aforesaid business, and at all times mentioned herein, respondents have been and now are in

substantial competition in or affecting commerce with corporations, firms, and individuals engaged in the sale and distribution of gas saver products of the same general kind and nature as that sold by respondents.

PAR. 12. The use by respondents of the aforesaid unfair and/or deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the purchase of substantial quantities of the aforesaid products manufactured and distributed by respondents. Further, as a result thereof, substantial trade is being unfairly diverted to respondents from their competitors.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of the Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Albano Enterprises, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1570 E. Edinger, Santa Ana, California.

Respondent Louis Albano is an officer of said corporation, and respondent Joseph Albano is the manager of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above-stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Albano Enterprises, Inc., a corporation, its successors and assigns, and its officers, and Louis Albano, individually and as an officer of said corporation, and Joseph Albano, individually, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the manufacturing, advertising, offering for sale, sale, or distribution of any products promoted as capable of causing a beneficial effect in the fuel economy, emission or other performance characteristics of any internal combustion engine in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

1. Making, directly or by implication, any statement or representation regarding the performance or effectiveness of said products unless such statement or representation is based upon and supported by prior, fully documented, adequate and well-controlled scientific studies or tests.

2. Failing to maintain copies of all documentation for the studies or tests referred to in subparagraph (1) of this paragraph.

3. Representing, directly or by implication, that respondents' products will fit all vehicles which are powered by gasoline engines.

4. Representing, directly or by implication, that the respondents' products have been approved, inspected, recommended or tested by the State of California or any other agency of government unless prior written approval is secured from the particular agency, or include in any public representation the name of any such agency without prior written authorization.

5. Representing, directly or by implication, that the respondents' products have been granted a patent unless there is in fact a current United States patent in force protecting those products.

It is further ordered, That any advertisement or other form of promotional representation respecting the efficacy or utility of respondents' products in the form of testimonials, must be based on fully documented, adequate, and well-controlled scientific studies or tests performed prior to the publishing or dissemination of said testimonials.

It is further ordered, That respondents shall forthwith cause the recall from all further use and destruction of all advertising copy, brochures and any other form of promotional representation, distributed to non-retail purchasers, which include statements or representations concerning the efficacy or utility of respondents' products that are inconsistent with any of the provisions set forth in this order.

It is further ordered, That respondents refund to each retail purchaser of the product the purchase price paid, in the event that such purchaser is dissatisfied with the product for any reason, within a period of one year from the date of purchase. Furthermore, should the product have any defect in workmanship or materials, the respondents shall replace the defective part or the product, as necessary, free of charge, within a one-year period from the date of purchase. Respondents shall clearly and conspicuously disclose their refund policy pursuant to the exact provisions of this order, in all advertising, promotional literature, package insert materials and the like, pertaining to the product.

It is further ordered, That each respondent shall forthwith

1. Deliver a copy of this order to cease and desist to all persons now engaged, or who become engaged in the advertising, offering for sale, sale, or distribution of respondents' products, as respondents' agent, salesman, franchisee, independent contractor, representative, or employee, and secure from each of said persons a signed statement acknowledging receipt of a copy thereof. For purposes of brevity, said persons shall be referred to hereinafter as "distributors."

2. Inform all distributors that the respondents are obligated by the acts or practices prohibited by this order, under the circumstances set forth in subparagraph 4 of this paragraph.

3. Institute a program of continuing surveillance to reveal whether the business operations of each of said distributors conform to the requirements of this order.

4. Upon receiving actual knowledge from any source (including but not limited to respondents' program of surveillance, and representatives of the Federal Trade Commission) of facts indicating a violation of any provision of this order by any distributor, or by any of such distributor's present and future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors, or

other representatives, respondents shall within 24 hours notify such distributor by certified mail, return receipt requested, that such violation of this order has occurred ("Notice"), and that respondents will discontinue dealing with said distributor upon receipt by respondents of actual knowledge of one (1) or more further violations of this order by such distributor, or by any of such distributor's present and future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors or other representatives, within one hundred and eighty (180) days of receipt of said Notice by such distributor. Respondents shall obtain from such distributor written acknowledgement of receipt of such Notice, which acknowledgement shall indicate the date of receipt of such Notice.

Upon receiving actual knowledge from any source (including but not limited to respondents' program of surveillance, and representatives of the Federal Trade Commission) of facts indicating one (1) or more violations of any provision of this order, within one hundred and eighty (180) days following a distributor's receipt of the aforesaid "Notice," by a distributor, or by any of such distributor's present or future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors or other representatives, respondents shall permanently discontinue dealing with such distributor.

5. Maintain complete records for a period of no less than three years from the date of the incident, of any written or oral information received which indicates the possibility of a violation of this order by any respondent or distributor, or any of such distributor's present and future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors, or other representatives; and maintain complete records of notifications of violations as required by subparagraph 4 of this paragraph, and of distributors' acknowledgements of receipt of such notifications. Any oral information received indicating the possibility of a violation of this order shall be reduced to writing, and shall include the name, address and telephone number of the informant, the name and address of the distributor involved, the date of the communication, and a brief summary of the information received. Such records shall be available upon request to representatives of the Federal Trade Commission, at normal business hours upon reasonable advance notice.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the manufacturing, advertising, offering for sale, sale, or distribution of any products promoted as capable of causing a beneficial effect in the fuel economy, emission or other performance characteristics of any internal combustion engine, or of his affiliation with a new business or employment in which his own duties and responsibilities involve the manufacturing, advertising, offering for sale, sale, or distribution of any products promoted as capable of causing a beneficial effect in the fuel economy, emission or other performance characteristics of any internal combustion engine. Such notice shall include the respondent's new business address and a statement as to the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligations arising under this order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

ALEXANDER'S, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND FAIR CREDIT REPORTING ACTS

Docket C-2892. Complaint, May 31, 1977 — Decision, May 31, 1977

This consent order, among other things, requires a New York City department store chain to cease failing to notify those individuals denied employment or terminated based on a consumer reporting agency report, the name and address of the reporting agency furnishing the report. Further, the firm must retroactively provide such information to those individuals denied employment or terminated because of adverse consumer reports during the two years preceeding issuance of this order.

Appearances

For the Commission: *Diana M. Kirigin* and *Ronald F. Stryshak.*

For the respondent: *Peter M. Gilman, Bartel, Engelman & Fishman,* New York City.

COMPLAINT

Pursuant to the provisions of the Fair Credit Reporting Act and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Alexander's Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Alexander's, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 500 Seventh Ave., New York, New York.

PAR. 2. Respondent, Alexander's, Inc. has been and is now operating a chain of department stores in the States of New York and New Jersey. In connection with the operation of these stores, respondent employs over 10,000 individuals.

PAR. 3. Respondent, in the course of processing applications for employment, obtains "consumer reports" from a "consumer reporting agency" as these terms are defined in Sections 603(d) and 603(f), respectively, of the Fair Credit Reporting Act.

PAR. 4. In a number of instances, subsequent to April 25, 1971,

respondent has denied consumers employment based in whole or in part on adverse information contained in consumer reports from a consumer reporting agency and has failed to so advise the job applicants against whom such action was taken and supply them with the name and address of the consumer reporting agency making the report.

PAR. 5. The acts and practices set forth in Paragraph Four above were and are in violation of Section 615(a) of the Fair Credit Reporting Act, and pursuant to Section 621(a) of that Act, respondent has thereby engaged in unfair acts or practices in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Alexander's, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 500 Seventh Ave., New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Alexander's, Inc., a corporation, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with denial or termination of employment wholly or partly because of information contained in a "consumer report" from a "consumer reporting agency" as these terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 (1970)), do forthwith cease and desist from failing to so advise the job applicants against whom such adverse action is taken and to supply them with the name and address of the consumer reporting agency making the report.

It is further ordered, That whenever respondent denies or terminates employment of an individual either wholly or partly because of information contained in a consumer report from a consumer reporting agency, respondent shall advise the individual in written form and shall supply him with the name and address of the consumer reporting agency which furnished the report.

It is further ordered, That respondent shall furnish the written notification referred to in the above paragraph to those individuals who were denied employment or terminated by respondent either wholly or partly because of information contained in a consumer report during the two year period preceding the date upon which this order becomes final.

It is further ordered, That respondent shall preserve evidence of compliance with the requirements imposed under this order for a period of not less than two years after the date each required disclosure is made. Respondent shall upon request permit the Commission through its duly authorized representatives to inspect such records.

It is further ordered, That respondent shall deliver a copy of this order to all present and future employees engaged in processing applications for employment.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent which may affect compliance obligations arising out of this order.

It is further ordered, That respondent herein shall within sixty (60)

days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

NATIONAL MERIDIAN SERVICES, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9027. Complaint, March 25, 1975 — Modifying order, June 1, 1977

Order modifying an earlier order dated March 28, 1977, 89 F.T.C. 192, by deleting the requirement that a Woodbury, N.Y. marketer of a basement waterproofing and termite control process cease failing to disclose to customers that instruments of indebtedness may be negotiable with third parties without the customer being notified of such action.

ORDER MODIFYING FINAL ORDER

Pursuant to Section 3.72(b)(2) of the Commission's Rules of Practice, and after consideration of respondents' petition of March 30, 1977 to reopen and modify Paragraph IA22 of the Final Order to Cease and Desist dated March 28, 1977, and after further consideration of the response of the Bureau of Consumer Protection in support of such petition,[1]

It is ordered, That Paragraph IA22 be altered and modified to read as follows:

> 22. Failing to disclose, orally prior to the time of sale and in writing on any trade acceptance, conditional sales contract, promissory note, or other instrument of indebtedness executed by the purchaser, with such conspicuousness and clarity as is likely to be observed and read by such purchaser, the disclosures, if any, required by Federal law or the law of the state in which the instrument is executed.

[1] The Commission hereby waives the 30-day limit under Rule 3.72(b)(2) and accepts the Bureau's answer to respondents' petition as being timely filed.

IN THE MATTER OF

ASTOR-SCOTT, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2893. Complaint, June 13, 1977 — Decision, June 13, 1977

This consent order, among other things, requires a Fort Lauderdale, Fla. mail order firm to cease disseminating advertisements which misrepresent the effectiveness of Exogen Vitamin E Oil in improving, treating, relieving or preventing skin, health or obesity problems. The firm must also cease disseminating advertisements which misrepresent the composition and efficacy of Phantom Roach Powder, and other insecticides. The order prescribes the circulation of deceptive or unsubstantiated product claims and requires the firm to maintain competent advertising substantiation files.

Appearances

For the Commission: *Ronald C. Cougill.*

For the respondents: *Milton Bass, Bass, Ullman & Lustigman,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Astor-Scott, Inc., a corporation; and Nelson Torelli, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of Sections 5 and 12 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Astor-Scott, Inc. is a Florida corporation with its office and principal place of business located at 6041 N.E. 14th Ave., Fort Lauderdale, Florida. It advertises and does business under various names geared to specific products, *e.g.*, Elizabeth Astor Division for "Exogen Vitamin E Oil," Super C Division for "Super C" Grapefruit Diet Plan, and Astor-Scott, Inc., for "Phantom Roach Powder."

Respondent Nelson Torelli is an individual and officer of Astor-Scott, Inc. He formulates, directs and controls its policies, acts and practices, including those hereinafter set forth. His business address is the same as that of the corporate respondent.

COUNT I

Alleging violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended. The allegations of Paragraph One are incorporated by reference as if fully set out herein.

PAR. 2. Respondents, d/b/a Elizabeth Astor Division, have, prior to November 5, 1973, been engaged in the advertising, offering for sale and mail order sale of "Exogen Vitamin E Oil," a skin cream and cosmetic, as the term "cosmetic" is defined in Section 15 of the Federal Trade Commission Act, as amended.

PAR. 3. Respondents cause the said product, when sold, to be transported from their place of business located in the State of Florida to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said preparations in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended. The volume of business in such commerce has been, and is, substantial.

PAR. 4. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said product by the United States mail and by various other means in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, including, but not limited to, advertisements inserted in newspapers, magazines and other advertising media for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said product; and have disseminated, and caused the dissemination of, advertisements concerning said product by various means, including, but not limited to, the aforesaid media for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparations in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

1. Thirsty, dry skin virtually drinks up this precious beauty fluid. Exogen Vitamin E Oil penetrates the outer skin layer.

2. Doctors and scientists have spent years and [sic] labor to unlock the hidden volumes of strange, wonderful Vitamin E. Now at last some of its fantastic benefits have been revealed for mankind. For instance, scientists have discovered that Vitamin E acts as an anti-oxidant when applied to the skin. It actually helps prevent the loss of vital moisture through perspiration! In fact, it supplies life-giving oxygen to skin cells!

3. Pure, virgin Vitamin E Oil * * * the *miracle ingredient* of 20th Century Cosmetology * * *

4. Just imagine * * * 28,000 International Units to *each* ounce! * * * truly virginal! Just one ounce equals in potency 28 bottles of diluted Vitamin E lotion.

5. Apply *pure* Vitamin E Oil *direct* to wrinkles, lines, blemishes and a dry, old looking skin! Now * * * capture again that lovely, dewy, younger looking complexion of happy days past * * * or pay nothing!

REVERSE THE PROCESS that makes you look older than your real years. *Think positive!* Wake up your stagnating skin to fresh new beauty. Give it the intense, loving care of this Vitamin E treatment. Then see how this miracle ingredient REVERSES the effects of abuse and neglect * * *

6. Apply in light, *rotating* motions, right on skin faults such as: dry flaky skin, fine lines, surface scars, wind or sunburned tissues, *even stretch marks.*

In just days, this thick, rich oil rewards your complexion with new radiant glamour and beauty * * * A thrilling surprise awaits you in just 5 days.

PAR. 6. By and through the use of said advertisements, respondents have represented, directly or by implication, that:

1. Vitamin E Oil is absorbed into the skin through topical application.

2. Vitamin E, through its anti-oxidant properties, prevents moisture loss and supplies oxygen to skin cells.

3. Vitamin E is a new, different, wonder or miracle ingredient, the inclusion of which yields additional benefits to Exogen Vitamin E Oil beyond the moisturizing effect of any emollient preparation.

4. The purity and strength of the Vitamin E in Exogen Vitamin E Oil have an effect on the performance or efficacy of the product.

5. Topical application of Exogen Vitamin E Oil will make one younger looking, yield a youthful complexion, or reverse the process of aging skin.

6. Topical application of Exogen Vitamin E Oil will prevent or improve skin faults such as dry flaky skin, fine lines, surface scars, wind or sunburned tissues, stretch marks, wrinkles or blemishes.

7. Topical application of Vitamin E has a salutary effect on the skin.

PAR. 7. In truth and in fact:

1. Vitamin E is not absorbed into the skin through topical application.

2. Vitamin E, through its anti-oxidant properties, does not prevent moisture loss nor supply oxygen to skin cells.

3. Vitamin E is not a new, different, wonder or miracle ingredient. Its inclusion does not yield additional benefits to Exogen Vitamin E Oil beyond the effect of any moisturizing preparation.

4. The purity and strength of the Vitamin E in Exogen Vitamin E Oil have no effect on the performance or efficacy of the product.

5. Topical application of Exogen Vitamin E Oil will not make one younger looking, yield a youthful complexion, or reverse the process of aging skin.

6. Topical application of Exogen Vitamin E Oil will not prevent or

improve skin faults such as dry flaky skin, fine lines, surface scars, wind or sunburned tissues, stretch marks, wrinkles or blemishes.

7. Topical application of Vitamin E has no salutary effect on the skin.

Therefore, the advertisements referred to in Paragraph Six were, and are, misleading in material respects and constituted, and now constitute, "false advertisements," as that term is defined in the Federal Trade Commission Act, as amended, and the statements and representations set forth in Paragraphs Five and Six were, and are, false, misleading and deceptive.

COUNT II

Alleging violation of Section 5 of the Federal Trade Commission Act, as amended. The allegations of Paragraph One above are incorporated by reference as if fully set out herein.

PAR. 8. Respondents have, prior to February 28, 1974, engaged in the advertising, offering for sale and sale of products, including, but not limited to, "Phantom Roach Trap and Powder."

PAR. 9. Respondents cause said products, when sold, to be shipped from their place of business in the State of Florida to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 10. In the course and conduct of their business, respondents have made statements and representations in the advertising, offering for sale and sale of their products through advertisements inserted in magazines and newspapers of interstate circulation and other advertising media.

PAR. 11. Among and typical of the statements and representations contained in said advertisements are the following:

1. Wipes out all roach nests in your home fast * * * or you pay nothing!

2. Drives Roaches Crazy. All kinds of roaches go wild over Phantom. They gobble it up and stagger off to die. Then a strange chain reaction takes place. A fatal disease spreads like wildfire, striking one roach after the other until each and every roach nest and egg is killed * * *

3. * * * Its high speed CHAIN REACTION formula was originally designed for professional exterminators. Now it has been released to the general public * * *

4. Just 1 can keeps your house free from roaches *up to 5 full years.*

Giant five year treatment.

PAR. 12. Through the use of statements and representations alleged in Paragraph Eleven hereof, and others of similar import and meaning,

respondents have represented, and are now representing, directly or by implication, that:

1. Respondents' roach powder will quickly wipe out all cockroach nests in an infested household.

2. Respondents' roach powder creates a deadly chain reaction which eliminates and kills roaches and eggs.

3. Respondents' roach powder was originally conceived for use by professional roach exterminators and has only recently been released to the general public for use in homes, factories and farms.

4. Respondents' roach powder, in normal use, will keep a household roach free for five full years.

PAR. 13. In truth and in fact:

1. Respondents' roach powder will not quickly wipe out all cockroach nests in an infested household.

2. Respondents' roach powder does not create a chain reaction which eliminates and kills roaches and eggs. Each cockroach must contact the insecticide to be killed. Respondents' roach powder will not kill roach eggs.

3. Respondents' roach powder was not originally conceived for use by professional exterminators, and products containing the same active ingredient as respondents' products have been available to the public for some time.

4. In normal use, respondents' roach powder will not keep a household roach free for five years.

Therefore, the statements and representations as alleged in Paragraph Eleven were, and are, false, misleading, unfair or deceptive acts or practices.

PAR. 14. By and through the use of statements and representations, including, but not limited to, those alleged in Paragraph Eleven, respondents have represented, directly or by implication, that Phantom Roach Powder retains its killing power for five full years. At the time of the said representations, respondents had no reasonable basis adequate to support such representations. Therefore, the aforesaid acts and practices were, and are, unfair acts or practices.

PAR. 15. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices and the dissemination of the aforesaid "false advertisements" has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 16. The aforesaid acts and practices of respondents, including

the dissemination of "false advertisements," as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Astor-Scott, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 6041 N.E. 14th Ave., Fort Lauderdale, Florida.

Respondent Nelson Torelli is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

COUNT I

It is ordered, That respondents, Astor-Scott, Inc., a corporation, its successors and assigns, and its officers, and Nelson Torelli, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of Exogen Vitamin E Oil, or any food, drug, device, or cosmetic, do forthwith cease and desist from:

A. Disseminating, or causing to be disseminated, by means of the United States mail or by any means in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, any advertisement for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of said product, which advertisement:

1. Represents in writing, orally, visually or in any other manner, directly or by implication, that:

(a) Vitamin E is absorbed into the skin through topical application to the extent and degree that such absorption would result in cosmetic or rejuvenative benefit;

(b) Vitamin E, through its anti-oxidant properties, prevents moisture loss or supplies oxygen to skin cells;

(c) Vitamin E is a new, different, wonder or miracle ingredient, the inclusion of which yields additional benefits to Exogen Vitamin E Oil beyond the effect of any moisturizing preparation;

(d) The purity and strength of the Vitamin E in Exogen Vitamin E Oil will have an effect on the performance or efficacy of the product;

(e) Topical application of Exogen Vitamin E Oil will make one younger looking, yield a youthful complexion or reverse the process of aging skin;

(f) Topical application of Exogen Vitamin E Oil will prevent and improve skin faults, including, but not limited to, dry flaky skin, fine lines, surface scars, wind or sunburned tissues, stretch marks, wrinkles and blemishes;

(g) Topical application of Vitamin E will have any salutary effect on the skin.

2. Contains any representation for any drug, cosmetic, food or dietary product, as being effective in the prevention, improvement, treatment or relief of skin faults or conditions, obesity or other appearance or health problems unless such representations are supported and substantiated by competent scientific data or tests. Such scientific data or tests shall be available in written form for inspection

by authorized representatives of the Federal Trade Commission during the period of time the representation is being made and for at least three years following the final use of the representation.

B. Disseminating, or causing to be disseminated, by any means, any advertisement for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, of Exogen Vitamin E Oil or any food, drug, device or cosmetic, which advertisement contains any representation prohibited by Count I of this order.

COUNT II

It is further ordered, That respondents Astor-Scott, Inc., a corporation, its successors and assigns, and its officers, and Nelson Torelli, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of Phantom Roach Powder, or any other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing in writing, orally, visually or in any other manner, directly or by implication, that:

1. Product use will result in total pest extermination in an infested household unless respondents can establish that such is the fact.

2. A progressive chain reaction or other functional characteristic will occur during or after product use unless respondents can establish that such is the fact.

3. The period of time during which the use or results of use will remain effective unless respondents can establish that such is the fact.

B. Representing, orally, visually, in writing or any other manner, directly or by implication, the efficacy, results of use, quality features, performance characteristics or composition of any product or service unless they are supported and substantiated fully by competent data or tests. Such data or tests shall be available in written form for inspection by authorized representatives of the Federal Trade Commission during the period of time the representation is being made and for at least three years following the final use of the representation.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other change in the corporation which may affect compliance obligations arising out of the

order. If it is demonstrably impossible to furnish such notice at least thirty (30) days prior to such event, notice shall be delivered to the Commission as soon as possible prior to consummation of any such occurrence.

It is further ordered, That the individual respondent shall notify the Commission at least thirty (30) days prior to the discontinuance of his present business and at least thirty (30) days prior to his affiliation with a new business or trade. If it is demonstrably impossible to furnish such notice at least thirty (30) days prior to such event, notice shall be delivered to the Commission as soon as possible prior to consummation of any such occurrence. Such notice shall include the respondents' current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

AMERICAN GENERAL INSURANCE CO.

Docket 8847. Interlocutory Order, June 14, 1977

Denial of respondent's motion to disqualify Commissioner Collier.

ORDER DENYING MOTION TO DISQUALIFY

Respondent has moved to disqualify Commissioner Collier from participation in the Commission's decision of the instant appeal. Respondent contends that Commissioner Collier's participation in this matter would, by virtue of his participation in prior court litigation, violate the Administrative Procedure Act[1] and the Due Process Clause.

In response to the motion, Commissioner Collier filed a memorandum stating that he declined to disqualify himself from participation and setting forth his reasons therefor. Upon consideration of respondent's motion, complaint counsel's answer and Commissioner Collier's memorandum, the Commission has determined that no grounds exist for granting the requested disqualification. The Commission does not believe that Commissioner Collier, as General Counsel, performed any investigative or prosecuting functions in this matter or that his prior participation raises a question about his ability to render a dispassionate judgment. Therefore,

It is ordered, That the aforesaid motion be, and it hereby is, denied.

Commissioner Collier did not participate in the Commission's determination of this matter.

MEMORANDUM OF CALVIN J. COLLIER, COMMISSIONER, IN RESPONSE TO MOTION THAT HE BE DISQUALIFIED FROM PARTICIPATION IN THIS PROCEEDING

MAY 25, 1977

On July 19, 1976, American General and Fidelity & Deposit (hereafter "American General") moved that I be disqualified from participating in this proceeding because, during my tenure as the Commission's General Counsel,[1] I was "of counsel" on a brief filed on behalf of the

[1] An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to Section 557 of this title* * *. 5 U.S.C. 554(d).

[1] From July 1973, through April 1975.

Commission in a collateral action American General brought to enjoin this proceeding.[2]

In an initial decision of March 7, 1972, which is not the subject of this appeal, an administrative law judge recommended that the complaint be dismissed because the Commission lacked subject matter jurisdiction under the McCarran-Ferguson Insurance Regulation Act ("McCarran Act"), 15 U.S.C. 1011. The Commission reversed the law judge, concluding that the McCarran Act would be no defense to this proceeding, 81 F.T.C. 1052 (1972). American General then filed its collateral action seeking to enjoin the proceeding, contending that the Commission had erred. The collateral action was dismissed, *American General Insurance Co.* v. *FTC*, 359 F.Supp. 887 (S.D. Tex. 1973), *aff'd*, 496 F.2d 197 (5th Cir. 1974).

American General's argument is that "the appearance of [my] name on the Fifth Circuit brief indicates that [I] have been an advocate of the Commission's position in this case and thus calls into question [my] ability now to render a dispassionate judgment therein."[3]

The brief American General mentions was filed on behalf of the Commission itself and not on behalf of Commission staff supporting the administrative complaint, and therefore presents no "mixture of functions" question under Section 5(c) of the Administrative Procedure Act.[4] The brief simply presented the conclusion already reached by the Commission, that the McCarran Act does not bar this proceeding. American General does not suggest that the Commission is somehow similarly disqualified for rejecting American General's McCarran Act defense. The brief did not offer an opinion as to whether, as the complaint alleges, American General has violated Section 7 of the Clayton Act, stating at one point that:

> [I]t is certainly possible that the result of the Commission proceedings against American General and F&D will be the dismissal of the Commission's complaint.

[Brief for the Appellees, at 16.]

My "of counsel" role on the Fifth Circuit brief indicates, at most, agreement with the Commission's prior decision on an issue of law and

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[2] "Memorandum of Points and Authorities in Support of Respondent's Motion to Disqualify Chairman Collier" ("Memorandum") at 1.

[3] "Memorandum," *id.*, at 2.

[4] As I have previously noted, the General Counsel neither possesses nor exercises prosecutorial responsibility in the Commission's administrative actions, which is the exclusive responsibility of the Bureaus of Competition and Consumer Protection and the Regional Offices. The General Counsel does not have the kind of stake in an administrative proceeding which would inhibit a fair decision, and his participation in an adjudication therefore does not offend Section 5(c) of the Administrative Procedure Act, 5 U.S.C. 544(d). *See* the Commission's orders and my memoranda in National Commission on Egg Nutrition, Dkt. 8987 (July 16, 1976) ["Order Denying Request to Disqualify"] 88 F.T.C. 84; and Jim Walter Corp., Dkt. 8986 (November 23, 1976) ["Order Denying Motion to Disqualify"] 88 F.T.C. 865, and the authorities there cited.

policy, *i.e.*, the application of the McCarran Act to this matter. American General would not, as a result, be denied a fair hearing in violation of Section 7(a) of the Adminstrative Procedure Act, 5 U.S.C. 556(b), as American General suggests. A fair hearing does not require the trier of fact to approach each new matter without any idea as to what the law or public policy requires.[5]

I conclude that there is no reason for me to decline to carry out my statutory duty to participate in this proceeding.

[5] *FTC* v. *Cement Institute*, 333 U.S. 683, 702-703 (1948); *American Cyanamid Co.* v. *FTC*, 363 F.2d 757, 764-765 (6th Cir. 1966); 2 Davis, Administrative Law §12.01.

IN THE MATTER OF

MENS' WEAR INTERNATIONAL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND WOOL PRODUCTS LABELING ACTS

Docket C-2894. Complaint, June 21, 1977 — Decision, June 21, 1977

This consent order requires a New York City importer and distributor of clothing to cease misrepresenting the wool and other fiber content of its wool blend clothing. Further, the order requires the respondent to notify all purchasers of its misbranded products that the clothing purchased had been misbranded.

Appearances

For the Commission: *John Varounis* and *Martin Gorman.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Mens' Wear International, Inc., a corporation, and Leon Rich and Frank Heineman, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Mens' Wear International, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 350 Fifth Ave., New York, New York.

Respondents Leon Rich and Frank Heineman are officers of the corporate respondent. They formulate, direct, and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

Respondents are engaged in the importation of clothing products, including but not limited to men's and boys' CPO jackets, and the sale and distribution of said items of clothing.

PAR. 2. Respondents, now and for some time last past, have imported for introduction into commerce, introduced into commerce, transported, distributed, delivered for shipment, shipped, offered for sale, and

sold in commerce as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were certain men's and boys' CPO jackets stamped, tagged, labeled, or otherwise identified by respondents as "30% reprocessed wool, 22% chief value linen, and 48% unknown reclaimed fibers" whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products, namely items of clothing with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more, and (5) the aggregate of all other fibers.

PAR. 5. Certain of said wool products were further misbranded by the respondents in violation of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the rules and regulations promulgated under said Act in the following respect:

Non-required information was set forth in such manner as to be false, deceptive or misleading in violation of Rule 10(b) of said rules and regulations. Among such non-required false, deceptive or misleading information was the term "chief value" used in connection with the disclosure of linen content on labels affixed to said wool products.

PAR. 6. The acts and practices of respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in commerce, under the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939; and,

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and,

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Mens' Wear International, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 350 Fifth Ave., New York, New York.

Respondents Leon Rich and Frank Heineman are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Mens' Wear International, Inc., a corporation, its successors and assigns, and its officers, and Leon Rich and Frank Heineman, individually and as officers of said corporation,

and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the introduction, or manufacture for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products.

2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

3. Placing non-required information on stamps, tags, labels or other identification affixed to such products that is in any way false, deceptive or misleading.

It is further ordered, That respondents notify, by registered mail, each of their customers that purchased the wool products which gave rise to this complaint of the fact that government tests have shown that such products were misbranded.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That each individual respondent named herein promptly notify the Commission of each change in business or employment status, which includes discontinuance of his present business or employment and each affiliation with a new business or employment, for ten (10) years following the effective date of this order. Such notice shall include respondent's current business address and a description of the business or employment in which he is engaged as well as a description of his duties and responsibilities. The expiration of the notice provision of this paragraph shall not affect any other obligations arising under this order.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

FRITO-LAY, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 2 OF THE CLAYTON ACT

Docket 9066. Complaint, Jan. 6, 1976 — Decision, June 24, 1977

This consent order, among other things, requires a Dallas, Texas ready-to-eat snack food producer and distributor to cease engaging in discriminatory pricing practices by selling its products to certain retailers at prices higher than those paid by a competitive establishment. Further, the order stipulates that in any enforcement action, respondent must assume the burden of proving all defenses raised.

Appearances

For the Commission: *Gordon Youngwood* and *Robert W. Rosen.*

For the respondent: *John Kirby, Mudge, Rose, Guthrie & Alexander,* New York City, *Miles J. Alexander, Emmet J. Bondurant* and *Susan A. Cahoon, Kilpatrick, Cody, Rogers, McClatchey & Regenstein,* Atlanta, Ga. and *Ronald R. Kranzow,* Dallas, Tex.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated and is now violating the provisions of subsection (a) of Section 2 of the Clayton Act, as amended (15 U.S.C. 13), and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Frito-Lay, Inc., a wholly-owned division of PepsiCo, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal offices located at Frito-Lay Tower, Exchange Park, Dallas, Texas.

PAR. 2. Respondent has approximately 49 plants in 25 states which produce a varied line of snack food products, including corn chips, potato chips, tortilla chips, pretzels and several more lines.

Respondent sells its corn chips and other snack food items of like grade and quality to a large number of purchasers located throughout the States of the United States who purchase such products for use and resale therein.

PAR. 3. Respondent is now, and has been, transporting corn chips and other snack food products from the state or states where such products are manufactured or stored in anticipation of sale to purchasers located

in other States of the United States. Respondent is therefore engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 4. In the course and conduct of its business in commerce, respondent sells its products of like grade and quality to purchasers who are in substantial competition with each other in the resale and distribution of respondent's like products.

PAR. 5. In the course and conduct of its business in commerce, respondent has been discriminating in price between different purchasers of its snack food products of like grade and quality by selling such products to some purchasers at higher and less favorable prices than the prices charged competing purchasers for such products of like grade and quality.

Illustrative of respondent's discriminatory pricing practices is the following:

Respondent has for several years had in effect a quantity discount program in the Central Division of its Great Lakes Zone whereby any account purchasing $200 up to $499.99 within a calendar month is entitled to a 3 percent discount on total purchases of respondent's products delivered at regular store-door prices; any account purchasing $500 or more within a calendar month is entitled to a 5 percent discount on total purchases of such products. Discounts earned under this policy are paid by check on a calendar quarter basis. Under said pricing program multiunit accounts are permitted to accumulate purchases of each unit in order to realize the maximum discount. The discriminations resulting from this program favor the retail stores, among others, of The Kroger Co.'s Indianapolis Division, in respondent's Great Lakes Zone. Many competitors of The Kroger Co. and other non-favored customers, were discriminated against in that they did not receive the maximum discount, although their store units purchased in greater volume than did individual units of the favored customers.

PAR. 6. The effect of the discriminations in price by respondent in the sale of its snack food products, as set forth hereinabove, has been or may be substantially to lessen competition or tend to create a monopoly in the sale of said products, or to injure, destroy or prevent competition between retailers that pay higher prices and competing retailers that pay lower prices for respondent's said products.

PAR. 7. The discriminations in price, as herein alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

DECISION AND ORDER

The Commission having issued its complaint on January 6, 1976, charging that the respondent named in the caption hereof has violated

the provisions of Section 2 of the Clayton Act, as amended, (15 U.S.C. 13); and

Respondent and complaint counsel, by joint motion filed October 26, 1976, having moved to have this matter withdrawn from adjudication for the purpose of submitting an executed consent agreement; and

The Commission, by order issued November 9, 1976, having withdrawn this matter from adjudication pursuant to Section 3.25(c) of its Rules; and

The respondent and counsel supporting the complaint having executed an agreement containing a consent order, which includes an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in the complaint, and waivers as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreements containing consent orders having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(d) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Frito-Lay, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Frito-Lay Tower, Exchange Park, Dallas, Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent for this purpose, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Frito-Lay, Inc., a corporation, and its officers, agents, representatives, employees, successors and assigns, directly or indirectly, through any corporate or other device, in connection with its sale of

> store-door delivered processed snack food products which are sold in a ready to eat state (that is which do not require further preparation by the purchaser before consumption) including, by way of example, rather than by limitation, potato, corn and tortilla chips; fried pork rinds; cheese puffs; pretzels; popcorn; chip dips; nut meats; peanut butter and cheese crackers; brownies; marsh-

mallow, raisin, fig and oatmeal cookies; dried meat sticks and jerky (hereinafter referred to as "prōducts")

in commerce, as "commerce" is defined in the Clayton Act, as amended, do cease and desist from:

Discriminating in the price of such products of like grade and quality by selling to any purchaser which is a retailer and which purchases for resale in its grocery store, market or similar competitive retail establishment (hereinafter referred to as "purchaser"), at a net price which directly or indirectly is higher than the net price charged any other purchaser who competes in the resale of respondent's products with the purchaser paying the higher price.

II

It is further ordered, That nothing herein contained shall prevent price differentials which make only due allowance for differences in the cost of manufacture, sale or delivery, resulting from the differing methods or quantities in which such products are sold or delivered to such purchasers or which are made in good faith to meet an equally low price of a competitor; nor shall anything herein contained prevent price changes from time to time where made in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned; and it is further provided that all other defenses legally available to a charge of price discrimination under Section 2(a) of the amended Clayton Act are not waived by this order.

III

It is further ordered, That in any enforcement action brought to enforce the provisions of this order, respondent shall assume the burden of proving all defenses described or referenced in Part II of this order.

IV

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in corporate structure of respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation, which may affect compliance obligations arising out of the order.

V

It is further ordered, That respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner in which it has complied with this order and shall file such other reports as may, from time to time, be required to assure compliance with the terms and conditions of this order.

IN THE MATTER OF

AMERICAN GENERAL INSURANCE COMPANY, ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 8847. Complaint, June 17, 1971 — Final order, June 28, 1977

This order, among other things, requires a Houston, Texas insurance company to divest itself completely of the Fidelity & Deposit Co. of Maryland, subject to F.T.C. approval, and prohibits the firm, for a ten-year period, from acquiring any U.S. company engaged in fidelity or surety underwriting, without prior Commission consent.

Appearances

For the Commission: *Jere W. Glover, Lawrence E. Gray, Karen G. Bokat* and *Harold E. Kirtz.*

For the respondent: *Leroy Jeffers, John L. Murchison, Jr., David T. Harvin, Vinson, Elkins, Searls, Connally & Smith,* Houston, Texas. *Michael J. Henke,* of counsel, Washington, D.C. and *George F. Reed,* Houston, Texas.

For intervenor: *Decatur H. Miller* and *Richard F. Over,* Baltimore, Md., Fidelity & Deposit Co. of Maryland.

COMPLAINT

The Federal Trade Commission, having reason to believe that American General Insurance Company has violated the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, by reason of its merger with Fidelity & Deposit Company of Maryland hereby issues this complaint pursuant to Section 11 of said Act, 15 U.S.C. 21 stating its charges in that respect as follows:

I

DEFINITIONS

PARAGRAPH 1. For the purposes of this complaint, the following definitions shall apply:

a. *Property-liability insurance* consists of a broad range of insurance coverage designed to protect the policyholder ("insured") by indemnification against loss or damage to his property resulting from fire, accident, natural perils and crime, liability to others for bodily injury, illness, death or property damage and loss resulting from the default of others.

b. *Fidelity* is a category of property-liability insurance gener-

ally issued in the form of a bond providing indemnity to the insured against loss caused by default or dishonesty of employees and public officials or others holding a position of trust.

c. *Surety* is a category of property-liability insurance generally issued in the form of a bond whereby the surety company guarantees indemnity for breach of performance of specific acts, principally construction of buildings, bridges, tunnels and similar projects, as well as license bonds and bonds guaranteeing the faithful performance by fiduciaries.

d. *Direct premiums written* represents the aggregate amount of recorded originated premiums, other than reinsurance, issued during the year whether collected or not at the close of the year, after deducting all premium returns.

e. *Net premiums written* represents retained premium income, direct or through reinsurance, less payments made for reinsurance ceded.

f. *Total admitted assets* are those assets of an insurer permitted by state laws or departmental rulings to be taken into account in determining a company's financial condition.

II

RESPONDENT

PAR. 2. Respondent, American General Insurance Company (hereinafter referred to as "American General"), is a corporation organized and existing under the laws of the State of Texas, with its office and principal place of business located at 2727 Allen Parkway, Houston, Texas.

PAR. 3. Originally organized in 1926, American General has developed into a diversified "all-lines" insurance company. The company has become a substantial factor in nearly every insurance market largely as a result of an aggressive acquisition policy. Operating primarily as a holding company, American General owned a controlling interest in nine other property-liability companies, seven life insurance companies and seven financial noninsurance subsidiaries in 1968.

PAR. 4. In 1968, the American General Group, which includes American General and its subsidiaries, was the 21st largest property-liability insurer in the United States based on net property-liability premiums written of $318.4 million. The company ranked 16th on the basis of $533.5 million in net premiums written for all categories of insurance. Total combined income and admitted assets of the companies comprising the American General Group amounted to $527.3 million and $1.5 billion respectively in 1968.

PAR. 5. In 1964, American General secured a major position in fidelity and surety underwriting with the acquisition of the Maryland Casualty Co., a leading independent property-liability insurer. In 1968, the American General Group ranked as the 12th largest underwriter of fidelity, accounting for over 3 percent of the total U.S. market on direct premiums written of $4.6 million. For that year it was the 6th largest surety underwriter with $15.1 million in direct premiums written, accounting for over 4 percent of the total U.S. market.

PAR. 6. At all times relevant herein, American General was engaged in "commerce" within the meaning of the Clayton Act.

III

FIDELITY & DEPOSIT COMPANY OF MARYLAND

PAR. 7. Prior to its merger into American General on July 1, 1969, the Fidelity and Deposit Company of Maryland (hereinafter referred to as "F&D"), was a corporation organized and existing under the laws of the State of Maryland, with its office and principal place of business located at Charles and Lexington Sts., Baltimore, Maryland.

PAR. 8. Originally founded in 1890, F&D had proven itself to be a successful and highly profitable company. A specialist in fidelity and surety underwriting, the company had concentrated over 88 percent of its business in these two markets with the remaining business being in the burglary, liability, homeowners and commercial multiple peril, dwelling fire lines and life insurance. In 1968, F&D had total direct premiums written of approximately $43 million with total admitted assets in excess of $158 million.

PAR. 9. In 1968, the year prior to its merger into American General, F&D ranked as the third largest fidelity underwriter with $10.4 million in direct premiums written. This represented over 7 percent of the national market. An aggressive and highly-service oriented company, F&D was the Nation's leading independent fidelity underwriter and a major independent surety underwriter. In that year F&D was the second largest company in surety premiums written. Its direct premiums written of $27.6 million accounted for over 8 percent of the total U.S. market.

PAR. 10. At all times relevant herein, F&D was engaged in "commerce" within the meaning of the Clayton Act.

IV

THE MERGER

PAR. 11. On or about July 1, 1969, F&D was effectively merged into

American General by reason of an agreement to affiliate dated February 24, 1969, pursuant to which all capital stock of F&D was converted into two shares of common stock and 0.4 shares of $1.80 preferred stock of American General. The transaction was valued at approximately $107.5 million.

V

TRADE AND COMMERCE

PAR. 12. Fidelity and surety bonds are primarily underwritten and sold by the same companies. Nevertheless, the two categories of insurance are clearly distinguishable. Since they are designed for different purposes, are sold to wholly different classes of customers and are dissimilar in underwriting concept, they are readily separable into two distinct markets.

PAR. 13. *Surety* underwriting: In 1968, total direct surety bond premiums written in the U.S. by all companies amounted to approximately $343 million with national concentration among the four and eight largest producers increasing at a substantial rate. From 1962 through 1968 the top four firms increased their share of the market from about 25 percent to nearly 31 percent. Similarly, by 1968 the eight leading firms showed an increase to nearly 48 percent from their 1962 level of about 43 percent. Combined with F&D, American General became the leader in surety bond underwriting with about 13 percent of direct premiums written, based on 1968 data. In addition, the merger resulted in American General being the largest surety bond underwriter in 16 state markets, among the top four underwriters in 29 state markets and among the top eight underwriters in 41 state markets. On the basis of 1968 data the merger had the effect of increasing concentration among the four top underwriters to approximately 35 percent, a relative increase of over 38 percent since 1962.

PAR. 14. *Fidelity* underwriting: In 1968, total direct fidelity premiums written in the U.S. by all companies amounted to approximately $140 million, and like the case with surety bond underwriters, concentration among the four and eight largest fidelity underwriters increased substantially between the years 1962 through 1968. During this period the four leading producers increased their market share from about 24 percent to over 31 percent. The eight largest firms grew from approximately 44 percent to nearly 54 percent. As a result of the merger, American General became the largest underwriter of fidelity insurance with approximately 11 percent of the national market based on 1968 data. In addition, American General became the largest underwriter in 12 state markets, was among the leading four underwri-

ters in 36 state markets and among the top eight companies in 41 state markets. On the basis of 1968 data the merger had the effect of increasing concentration among the four top underwriters to about 35 percent and among the top eight underwriters to nearly 57 percent.

PAR. 15. Increasing concentration and a decline in the number of fidelity and surety bond underwriters is directly attributable to a significant merger trend in recent years in the property-liability field. Between the years 1960 and 1968 a total of 580 mergers and acquisitions involving property-liability insurers took place. The value of their admitted assets exceeded $9.9 billion. Over 60 fidelity and surety bond underwriters have been acquired since 1957 and of these over half have been horizontal in nature. This trend has accelerated sharply in the 1960's with over 20 major horizontal combinations having taken place between 1963 and 1969.

VI

EFFECT OF MERGER

PAR. 16. The effect of the merger of F&D into American General may be substantially to lessen competition or to tend to create a monopoly in the business of underwriting fidelity and surety bonds in the United States and in various state and other geographic markets, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, in the following ways, among others:

a. Substantial, actual and potential competition between American General and F&D has been, or may be, eliminated;

b. F&D has been eliminated as a substantial independent factor in the business of underwriting fidelity and surety bonds;

c. Concentration in the business of underwriting fidelity and surety bonds has been increased to the detriment of actual as well as potential competition;

d. An acceleration of the trend toward mergers and acquisitions has been encouraged and may contribute to further increases in concentration and the decline in the number of underwriters of fidelity and surety bonds.

VI

PAR. 17. The merger of F&D into American General as alleged in Paragraph 11 constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

Chairman Kirkpatrick did not participate in this matter.

INITIAL DECISION BY MONTGOMERY K. HYUN, ADMINISTRATIVE LAW JUDGE

AUGUST 8, 1975

PRELIMINARY STATEMENT

[1] On June 17, 1971, the Federal Trade Commission ("Commission") issued the complaint herein, charging American General Insurance Company ("American General") [2] with violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), by its July 1969 acquisition of substantially all of the stock of Fidelity & Deposit Company of Maryland ("F&D") for American General stock valued at about $107.5 million. The complaint alleges that the effect of American General's acquisition of F&D may be to lessen competition substantially or tend to create a monopoly in the business of writing fidelity and surety bonds in the United States by eliminating substantial actual and potential competition between American General and F&D, by eliminating F&D as a substantial independent factor in the fidelity and surety bond industries, by increasing concentration in these industries, and by accelerating the merger trend in these industries.

On August 30, 1971, respondent duly filed its answer admitting certain allegations of the complaint and denying others, and asserted that the Commission was without jurisdiction in this matter by virtue of the provisions of the McCarran-Ferguson Act (15 U.S.C. 1011). On October 5, 1971, the Hearing Examiner granted F&D's September 21, 1971 motion for leave to intervene. On February 11, 1972, the Commission dismissed complaint counsel's appeal from the Hearing Examiner's order authorizing intervention.

After briefs, the Hearing Examiner, on March 7, 1972, issued his Initial Decision and order granting the December 27, 1971 joint motion of respondent and intervenor for summary decision and dismissed the complaint for lack of jurisdiction. Upon complaint counsel's appeal and after briefs and oral argument, the Commission, on December 5, 1972, vacated the initial decision and remanded the case to the Administrative Law Judge for further proceedings. The attempt of respondent and intervenor to have the Commission proceedings judicially enjoined has been unsuccessful. *American General Insurance Co.* v. *Federal Trade Commission*, 359 F. Supp. 887 (S.D. Tex. 1973), *aff'd*, 496 F.2d 197 (5th Cir. 1974).

A number of prehearing conferences were held by my predecessors and myself in September and December 1971, March, July and August 1973, and in February 1974. Evidentiary hearings on the Section 7 issue began on April 8, 1974 and concluded on December 16, 1974. The record

was closed on January 7, 1975, after submission of stipulations regarding the anticipated testimony of [3] certain uncalled witnesses. Counsel for respondent and intervenor and complaint counsel filed proposed findings of fact and conclusions of law, together with supporting briefs, on March 7, 1975, and reply briefs on April 3, 1975.

This case is before me upon the complaint, answer, testimony and other evidence, proposed findings of fact and conclusions and briefs filed by the parties and the intervenor. These submissions have been given careful consideration and, to the extent not adopted herein in the form proposed or in substance, are rejected as not supported by the record or as immaterial. Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this decision, are denied.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings and conclusions submitted by the parties and the intervenor, the Administrative Law Judge makes the findings set forth below.[1] [4]

FINDINGS OF FACT

I. *Identity and Business of Respondent*

1. Respondent American General Insurance Company (hereinafter "American General") is a corporation organized and existing under the laws of the State of Texas, with its office and principal place of business at 2727 Allen Parkway, Houston, Texas (Complaint and Answer, par. 2).

2. American General was organized in 1926 and has since diversified into an all-lines insurance company (Complaint and Answer, par. 3). It operates in all 50 states, in every province of Canada, in western Europe and in other places throughout the world, offering insurance and

[1] References to the record are made in parentheses, and the following abbreviations are used:

F - Findings of this initial decision.

CPF - Proposed findings of fact, conclusions of law and order of complaint counsel, followed by the proposed finding referred to.

CRB - Complaint counsel's reply brief, followed by the page numbers referred to.

RPF - Respondent's proposed findings of fact and conclusions of law, followed by the proposed finding referred to.

RB - Respondent's brief in support of proposed findings, followed by the page number referred to.

RRB - Respondent's reply brief, followed by the page number referred to.

CX - Complaint counsel's exhibits.

RX - Respondent's exhibits.

The transcript of the proceedings is referred to with the last name of the witness and the page number or with the abbreviation Tr. and the page.

Intervenor F&D joined in respondent's various pleadings, including proposed findings of fact and conclusions of law and supporting briefs, or filed separate pleadings noting its support of respondent's positions, throughout the proceedings before the Administrative Law Judge. Therefore, the findings and discussions with respect to all substantive issues of fact and law contained in this Initial Decision apply equally to F&D's submissions.

financial services (CX 87, 88). At all times relevant herein, respondent was engaged in commerce, as "commerce" is defined in the Clayton Act, 15 U.S.C. 12 (Complaint and Answer, par. 6).

3. American General now operates primarily as a holding company. At the time of its July 1969 acquisition of Fidelity & Deposit Co. of Maryland ("F&D"), American [5] General had a controlling interest in nine property and liability insurance companies (including the six-company Maryland Casualty Group and one company which has since been sold), six of which wrote fidelity and surety bonds (RRB, p. 15; CX 3, p. 17; CX 4, p. 12; CX 9; CX 19, pp. 79-80; CX 24C, pp. 26-27; CX 25, 39, 40; CX 78A; CX 85-88).

4. American General also owned six life insurance companies at the time of the acquisition of F&D (CPF 8; CX 19, pp. 80-84), and had interest as well in several noninsurance financial institutions (CX 19, pp. 81-82).

5. American General's 1964 acquisition of Maryland Casualty Company ("Maryland Casualty"), an independent multiple lines company, and its affiliated companies, was a significant acquisition in the fidelity and surety fields (RRB, p. 19; Complaint and Answer, par. II 5; CX 24C, p. 42). In 1963, the year prior to that acquisition, American General had net fidelity and surety premiums of approximately $775,000, whereas Maryland Casualty's net fidelity and surety premiums totalled $12,379,000 (CX 24C, p. 12). In 1964, Maryland Casualty ranked 11th nationally in direct surety premiums with $8.9 million in direct premiums and 3.37 percent of the market, and ranked 13th in direct fidelity premiums with $3.8 million in direct premiums and 2.88 percent of that market (CX 95C, E).

At the time of its acquisition in 1964 by American General, Maryland Casualty was a substantial and profitable company (CX 24C, p. 21). From 1955 to 1963, inclusive, it ranked consistently among the Nation's top 10 surety writers, and ranked each year among the Nation's top 15 fidelity writers during that same period (CX 95, 96; RX 235, 236, 237).

6. In its prospectus of August 2, 1964, issued prior to acquiring control of Maryland Casualty, respondent asserted its intention to maintain the *status quo* as to Maryland Casualty's operations, saying, "* * *it is contemplated that no change will be made in Maryland's name, identity, or home office location, and that, consistent with the best interests of Maryland and its stockholders, no substantial change will be made in Maryland's customs, methods, home office personnel, field and agency personnel, investment practices, and banking and investment connections. It is the intention of American General that all Maryland [6] personnel will continue to enjoy their job security, consistent with good business practice. This assurance applies particu-

larly to Maryland's president, Mr. H. Ellsworth Miller, who is regarded by American General as competent and well qualified." (CX 24C, p. 3). Respondent was later to use similar language in its proxy statement referring to the acquisition of F&D (CX 19, pp. 6 and 7).

7. However, in its 1964 Annual Report, American General announced its intention of consolidating Maryland Casualty and American General operations (CX 7, p. 14). The American General 1965 Annual Report indicated that this policy of unifying the two companies was becoming a reality, that the two were becoming, in effect, one all-lines insurance group rather than remaining two separate insurance companies (CX 6, p. 16). This is evidenced by the fact that, in its annual reports, American General shows its operating results by line of business rather than by companies or company groups.

8. In 1966, American General changed Maryland's management, including naming a new president to replace H. Ellsworth Miller, and appointing Gus S. Wortham, then chairman and chief executive officer of American General, as chief executive officer of Maryland Casualty (Woodson, Tr. pp. 1039, 1047-1049).

9. Respondent has been a member of the Surety Association of America (the trade association of fidelity and surety underwriters) for some 15 years, and is a member of its Executive Committee (Pearson, Tr. 271; CX 116, p. 6; CX 145A-K).

10. In the period 1958 to 1968, respondent American General's statutory earnings grew from $2,230,000 to $30,676,000, capital and surplus increased from $20,824,000 to $261,550,000, and premium income went from $37 million to $450 million (CX 3, pp. 14-15; CX 8, p. 6). In 1968, American General's combined income and admitted assets were $527 million and $1.5 billion, respectively (Complaint and Answer, par. II 4). The company ranked approximately 15th nationwide among United States stock property-liability companies, and ranked about 9th that year by insurance in force among all stock life insurance companies (CX 3, p. 22). [7]

II. *Identity and Business of the Acquired Firm*

11. Fidelity and Deposit Company of Maryland (F&D) was, prior to its acquisition by American General on July 1, 1969, a corporation organized and existing under the laws of the State of Maryland, with its office and principal place of business located at Charles and Lexington Sts., Baltimore, Maryland (Complaint and Answer, par. 7).

12. Originally founded in 1890 as a banking and bonding institution, F&D had proven itself to be a successful and highly profitable company (CX 11, p. 3; CX 12, p. 3; CX 13, p. 3; CX 14, p. 3; CX 15, p. 3; CX 16, p. 3; CX 63A; Shrake, Tr. 1334, 1404; Culbertson, Tr. 1488, 1490, 1528).

13. In 1910, F&D extended the scope of its activities to include the writing of burglary, robbery and theft insurance. In 1942, F&D entered the inland marine insurance field, but has confined its writings therein to the Personal Property Floater policy, which is a comprehensive form of insurance covering personal property, wherever located, against almost any cause or loss or damage. In 1958, F&D further broadened its activities to include fire, extended coverage and homeowners' multiple peril coverages which provide protection to homeowners against loss or damage to their homes caused by fire, windstorm, hail and other losses and liabilities incident to home ownership (CX 17, p. 89). In 1964, F&D created a subsidiary to write life insurance, Maryland Life Insurance Company of Baltimore (CX 15, p. 5).

14. Despite such diversification, F&D remained a specialist in fidelity and surety underwriting. Eighty-eight percent of its business in 1968 was concentrated in these two lines, with the remaining business being in the burglary, liability, homeowners and commercial multiple peril, dwelling fire lines and life insurance (Complaint and Answer, par. 8; CX 11, p. 6; CX 12, p. 6). Surety constitutes the larger part of F&D's bond business and is more than twice as large as its fidelity. In 1968, fidelity accounted for 25.2 percent and surety accounted for 63.4 percent of F&D's premiums (CX 11, p. 6). The bulk of F&D's surety business consists of contract bonds. For example, in 1970, 74 percent of F&D's surety premiums were derived from contract bonds (CX 1, p. 7; CX 11, p. 5; RX 79).

[8] 15. F&D writes business in all 50 states through 51 branch and service offices. Two-thirds of F&D's 1100 employees work in the branch offices (CX 17, pp. 90-91). At all times relevant herein, F&D was engaged in "commerce" within the meaning of the Clayton Act (Complaint and Answer, par. 10).

16. An aggressive and highly service oriented company prior to the acquisition by American General, F&D was the Nation's leading independent fidelity underwriter and a major independent surety underwriter (CX 11, p. 5; CX 15, p. 3; CX 16, p. 3; CX 68A; Culbertson, Tr. 1700-1701). By 1967, F&D had become the leading writer of court and fiduciary bonds, a very profitable surety line (CX 12, p. 6; CX 14, p. 4).

17. In 1968, the year prior to its acquisition by American General, F&D had total direct premiums written of approximately $43 million, with total admitted assets in excess of $158 million, and a capital and surplus account in excess of $89 million (Complaint and Answer, par. 8; CX 17, p. 54).

18. F&D was regarded in the industry as a very conservative company, which carefully controlled its underwriting practices and

accepted only those risks with a very low probability of loss (Krupp, Tr. 991; Spickard, Tr. 1119; McVay, Tr. 1380; Culbertson, Tr. 1486, 1731-1732; CX 12, p. 5; CX 63; CX 68A).

19. F&D has been a member of the Surety Association of America for some 15 years and is represented on its executive committee. Mr. Coe Culbertson, president of F&D and a witness in these proceedings, currently occupies F&D's seat on that committee (Pearson, Tr. 271; Culbertson, Tr. 667, 679A–680A; CX 145A-K).

20. American General acquired ownership of F&D on July 1, 1969, for stock valued at $107.5 million (Complaint and Answer, par. 11). The acquisition represented American General's second major acquisition in 5 years in the fidelity and surety markets (F. 5, *supra*).

21. American General's reason for acquiring F&D, as set forth in its proxy statements filed with the SEC, was that "American General's fidelity and surety business will be strengthened by the addition of Fidelity's fidelity and surety business." (CX 17, p. 6; CX 18, p. 6; CX 19, p. 6).

[9] 22. F&D made a substantial contribution to American General's financial position. F&D's admitted assets in 1968 were $158,333,000 and added 10 percent to American General's admitted assets. F&D's capital and surplus for 1968 was $89,406,000 or 34 percent the size of American General's (CX 17, p. 64). Admitted assets and capital and surplus of F&D ($247,739,000) were far in excess of the purchase price paid by American General ($107.5 million) for the acquisition.

23. In its prospectus issued prior to acquiring ownership of F&D, American General declared its intention "that there will be no change in Fidelity's* * *Board of Directors, officers, home office personnel, field and agency personnel, basic pattern of operations, nature of business, investment practices and banking and investment connections." (CX 18, p. 7). However, the current chairman, president and chief executive of American General testified that American General envisions consolidation of F&D's investment operations with those of the American General group (Woodson, Tr. 1023).

24. All the members of the American General group except F&D follow an integrated underwriting procedure (Woodson, Tr. 1040-1041).

25. Since 1970, no F&D earnings were retained to increase F&D's capital and surplus. In addition, in 1973, F&D paid American General a special dividend amounting to $20 million, which reduced F&D's capital and surplus by that amount. The special dividend equalled more than 20 percent of F&D's capital and surplus at that time (Woodson, Tr. 1034-1036; Culbertson, Tr. 1531-1532).

III. *Viability of F&D as a Separate Entity*

26. In 1968, the year prior to the acquisition, F&D was number three in the fidelity market and number two in the national surety market. It was considered a healthy and ably managed company, with an exceptionally strong financial position and a record of excellent underwriting achievement (CX 68A, B; CX 72).

27. In absolute terms, F&D's direct premium writings of both fidelity and surety showed a marked increase **[10]** overall in the period between 1962 and 1973.[2] Perhaps more significant is the fact that F&D's direct premium writings have grown at the same rate as or slightly higher rate than that of the entire industry. F&D's 1972 fidelity writings, in terms of direct premiums written, were 187 percent of its 1962 writings. The industry growth for the same period was 180 percent. Similarly, F&D's 1972 surety writings were equal to 210 percent of its 1962 writings; the industry-wide growth was 200 percent. Clearly, F&D is at least holding its own, if not doing slightly better than the industry as a whole, in terms of absolute volume of business (CX 92-96, 119-125; RX 74-81, 232-233).

28. F&D has always been considered a highly profitable company (Tr. 1488) and has experienced increased profitability in recent years, as indicated by declining loss ratios in its fidelity and surety business. In both lines, F&D's loss ratio began to fall in 1966; the decline was interrupted by a slight increase in 1969, the year of acquisition, then continued through 1973. For several years, F&D's loss ratio in both lines has been substantially below that of the industry as a whole (CX 92-95; RX 74-81, 232-233).[3] These figures indicate that F&D has successfully

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[2] F&D's market share in 1968 was higher in both the fidelity (7.4 percent) and surety (8.0 percent) markets than it was in 1962 when F&D ranked first in both markets.

In fidelity, F&D has not shown an increase in writings each year, but every *3-year* cycle (with the one exception 1964/1967) has marked an increase in direct premium volume. Moreover, the statistics for F&D fidelity writings do generally track the industry-wide pattern of advances and declines. See Table A.

F&D's surety writings have increased every year except 1973.

[3] See Tables A and B, on pp. 11-12. **[11]**

TABLE A

F&D's Growth in Direct Premiums Written Compared With Industry
(Countrywide).

	F&D	
	Fidelity	*Surety*
	Direct Premium	*Direct Premium*
1962	7,865,179	15,773,348
1963	10,775,643	17,292,171
1964	10,154,169	17,945,914
1965	8,657,585	20,579,584
1966	10,971,384	23,937,751
1967	9,922,132	26,284,943
1968	10,392,000	27,581,851
1969	13,174,964	29,256,066

(Continued)

competed for the more profitable underwriting business in both fidelity and surety.

[13] 29. At the time of its acquisition by American General, F&D was

1970	11,348,479	31,759,184
1971	13,100,423	32,347,260
1972	14,768,072	33,374,278
1973	12,528,836	33,209,760
	Growth, 1962-1972: 187%	Growth, 1962-1972: 210%

Industry

	Fidelity Direct Premium	*Surety Direct Premium*
1962	111,904,039	229,277,298
1963	140,011,023	250,394,904
1964	133,703,198	265,512,304
1965	118,920,180	291,194,049
1966	140,591,153	308,662,286
1967	137,907,918	320,000,629
1968	139,685,512	342,858,200
1969	177,224,453	366,185,880
1970	176,258,431	384,594,021
1971	188,386,624	423,407,997
1972	201,691,180	463,670,429
1973	198,235,701	504,493,587
	Growth, 1962-1972: 180%	Growth, 1962-1972: 200%

(CX 119-125, 92-96; RX 74-81, 232-233) [12]

TABLE B

F&D's Loss Ratios Company With Industry

Fidelity

	F&D's Loss Ratio	*Industry*
1962	21.0	33.0
1963	80.0	55.0
1964	35.0	45.0
1965	48.0	46.0
1966	56.0	50.0
1967	56.0	48.0
1968	51.7	54.5
1969	56.9	55.5
1970	56.9	49.5
1971	45.6	52.5
1972	39.3	43.1
1973	31.2	49.7

Surety

	F&D's Loss Ratio	*Industry*
1962	17.0	28.0
1963	17.0	46.0
1964	16.0	32.0
1965	16.0	29.0
1966	21.0	29.0
1967	11.0	24.0
1968	20.3	26.2
1969	22.1	24.2
1970	24.2	30.1
1971	31.9	30.5
1972	20.6	25.8
1973	18.1	32.3

(CX 92-95; RX 74-81, 232-233).

capable of continuing in business as a viable independent entity (Fs. 26-28, *supra*).

IV. *Nature of the Fidelity and Surety Bond Industries*

A. Product Market

30. The relevant product markets in this case are two: fidelity bonds and surety bonds (Fs. 31-57, *infra*).

(1) Surety

31. Commercial or corporate surety possesses certain peculiar characteristics not common to other lines of insurance generally (Fs. 32-39, *infra*).

32. Unlike ordinary insurance policies, which are two-party agreements, surety bonds represent three-party agreements in which the principal agrees to perform a certain obligation for an obligee, and in the same instrument, a surety agrees to guarantee that performance or indemnify the obligee if the principal fails to perform under the terms of the contract (Fait, Tr. 139-140; Moritz, Tr. 174A; Pearson, Tr. 282).

33. There are a number of different types of surety bonds, including contract bonds, license and permit bonds, court and fiduciary bonds, and miscellaneous trade and financial guarantees (Sinclair, Tr. 71; Moritz, Tr. 174A; Ruesch, Tr. 452; CX 17, p. 89). Contract bonds account for about 60 percent of the surety premiums written (Sinclair, Tr. 72; Hepburn, Tr. 409, 1206; Ruesch, Tr. 452; Culbertson, Tr. 1686-1687). The contract bond principally covers the bonding of underlying construction contracts performed by a contractor or contractors, and guarantees the faithful performance of those contracts according to plans and specifications of the underlying contract. It also covers the payment obligations of that particular contract (Sinclair, Tr. 71; Fait, Tr. 139-140; CX 117, pp. 4-11). Such bonds are written on a job-by-job basis and cover the underlying contracts for particular projects (Sinclair, Tr. 74). A fiduciary bond guarantees that the individual charged with husbanding and disposition of the assets in a trust or estate will properly perform his fiduciary duties **[14]** (Sinclair, Tr. 72; CX 76, pp. 4-9). A judicial bond is required when a verdict has been appealed to guarantee that appellant can pay the amount of the judgment (Sinclair, Tr. 73; CX 76, p. 24). A municipality may require a license bond to insure that a person performs his job in accordance with the terms of his license. If the license is violated and an injury results and the licensee cannot pay the damages, the bonding company steps in and pays the damages (Moritz, Tr. 175).

34. Unlike insurance, a surety bond cannot ordinarily be cancelled (Sinclair, Tr. 73-74, 79; Fait, Tr. 143; Ruesch, Tr. 452-453).

35. The rate charged for a surety bond is not set with regard to actuarial tables of loss experience. It is, rather, essentially a flat rate charged for services performed. The premium then is similar to interest paid a bank for a loss. Surety rates bear no relation to, nor are they affected by, insurance rates (CX 117, p. 4; Sinclair, Tr. 73-74, 81-82; Fait, Tr. 140-141; Moritz, Tr. 176-179; Ruesch, Tr. 453; Shrake, Tr. 1392-1393).

36. Surety provides a form of protection not provided by any type of insurance. Insurance compensates for loss; surety guarantees that a job will be completed (Fait, Tr. 143-144; Wells, Tr. 1600-1602; CX 117, pp. 9-11).

37. Salvage is very important on a surety bond but not on an insurance policy. If a loss occurs on a bond, the bond company begins salvage work. In the case of a construction bond, for example, the underwriting company attempts to determine the best way of completing the project. The company will try to assist the principal in fulfilling his contract. If that is impossible, the surety company and the obligee work out an agreement on how to finish the job. The surety company may succeed in recovering or preventing a large portion of the loss (Fait, Tr. 139, 144; Wells, Tr. 1600-1602; CX 117, pp. 9, 11).

38. Unlike an insurance company, the bonding company has a right of subrogation against the principal. It can recover from him any losses on the bond (Fait, Tr. 139-140; Culbertson, Tr. 836).

39. Special expertise, beyond that of the general experienced insurance underwriter, is needed to underwrite surety bonds (Sinclair, Tr. 107; Fait, Tr. 155-156; Moritz, Tr. 188).

[15] 40. Surety is generally recognized as a separate product line. The Surety Association of America exists as a separate trade association for the fidelity and surety industries (Sinclair, Tr. 94). The American Insurance Association has separate counsel and a separate advisory committee for fidelity and surety (Pearson, Tr. 284). There is a trade association, the National Association of Surety Bond Producers, for agents who specialize in fidelity or surety (Pearson, Tr. 275, 290-291; Halpin, Tr. 901-902; Shrake, Tr. 1406).

41. Personal surety, bank letters of credit, self-insurance, cash and securities deposits, and the like, proffered by respondent as forms of guarantee comparable to the security bond, are not widely enough used to be considered practical substitutes for the corporate surety bond (Fs. 36-39, *infra*).

42. The use of personal surety is dying out. Personal surety is almost never used in substitution for a corporate surety bond on a

construction contract (Wells, Tr. 1609-1613). F&D's president, testifying on respondent's behalf, could not give any specific example of bond business lost to personal surety, though he stated that personal surety was in use (Culbertson, Tr. 836-838, 1695).

43. Vague, general statements regarding cash deposits were made during these hearings, but no concrete instances of the actual use of cash or securities deposits in lieu of surety bonds were cited in the record (see, for example, Culbertson, Tr. 836, 1685-1688; Backman, Tr. 1941). It is especially unlikely that deposits of cash or securities could be a practical substitute for surety bonds on construction projects; the tying up of assets that it would involve would be a great burden to the contractor.

44. The record does not support the assertion that bank letters of credit are in sufficient use to be considered a practical substitute for corporate surety bonds. The president of F&D could name no instances of such substitution and stated that letters of credit were not acceptable on Federal and many other public construction projects (Culbertson, Tr. 1685-1686, 1691-1693). Indeed, there is testimony to the contrary, that such use of bank letters of credit is infrequent. In fact, despite their relatively low rate, its use is on the decline (Wells, Tr. 1611-1613).

[16] 45. Despite general and vague assertions by a witness for respondent that "they" (referring to one or more unnamed title companies) "are practicing surety" (Culbertson, Tr. 1693), there is no specific evidence in the record that title companies' guarantees are replacing corporate surety. A witness for complaint counsel testified he knew of no specific case where a title company actually acted as surety (Wells, Tr. 1613). Witnesses for neither side could point to a specific company by name, though they seemed to have specific instances in mind, where a title company either did write or was forbidden to write insurance that was similar to a surety bond (Wells, Tr. 1613-1614; Culbertson, Tr. 1817). On the basis of this record, it cannot be found that title companies provide a practical substitute for corporate surety.

46. In short, the alleged substitutes for surety are either less convenient, more burdensome, less reliable or less easy to obtain than corporate surety bonds and do not in fact constitute practical substitutes for corporate surety bonds (Fs. 36-39, *supra*).

47. Surety is separate and distinct from insurance and has no close substitutes (Fs. 35-40, *supra*).

(2) Fidelity

48. Fidelity bonds are instruments by which the underwriting company agrees to indemnify an employer for losses arising out of the

dishonest acts of his employees (Sinclair, Tr. 87; Moritz, Tr. 181; Ruesch, Tr. 453; CX 2, p. 89). The purpose of fidelity bonds is to indemnify the employer for loss of money and other property sustained through dishonest acts of his bonded employees. The scope of acts insured against includes larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, willful misapplication, or other fraudulent or dishonest acts committed by the employee, whether acting alone or in collusion (CX 77, pp. 5-6).

49. Fidelity is more closely akin to insurance than is surety, but it too is a product line separate from general insurance and surety (Fs. 50-56, *infra*).

[17] 50. The principal customer categories for fidelity bonds are financial institutions and mercantile or commercial enterprises (Sinclair, Tr. 87; CX 135). At Insurance Company of North America (INA), at least two-thirds of total fidelity writings are for financial institutions, while at Continental Insurance Company and F&D, some 60 percent of fidelity writings are for financial institutions (Sinclair, Tr. 88; Ruesch, Tr. 454; Culbertson, Tr. 1696). Financial institution fidelity bonds are identified by descriptions of the institutions that purchase them and include: Insurance Companies Blanket Bonds, Small Loan Companies Blanket Bonds, Bankers Blanket Bonds, Savings and Loan Association Blanket Bonds, Credit Union Blanket Bonds, and Stock Brokers and Investment Bankers Blanket Bonds. Other categories of fidelity bonds include: Public School System Employee Blanket Bonds, Blanket Bonds for Federal Departments, Forgery Bonds, and bonds for club and recreational activities (CX 91, Part II, p. 1; Sinclair, Tr. 87-88; Ruesch, Tr. 453-454).

51. Unlike insurance, fidelity bonds involve an element of suretyship: three parties are involved in that the underwriter vouches for or stands as guarantee for the honesty of an employee/principal, to an employer/insured. Moreover, unlike many forms of insurance, fidelity involves the possibility of salvage or subrogation for the insurer (Wells, Tr. 1600-1602).

52. Special training beyond that required for the general insurance underwriter is required for a fidelity bond writer (Moritz, Tr. 188-189), and most companies have different underwriters for fidelity and insurance (Sinclair, Tr. 90, 93-94; Moritz, Tr. 187-189). To write fidelity bonds successfully requires the knowledge of loss prevention techniques and the ability to advise customers of those methods (Wells, Tr. 1600-1602). Fidelity is a specialty line that involves an effort to closely follow the internal and external control aspects of the firm being bonded (Sinclair, Tr. 90, 93).

53. Fidelity rates are based to some extent on loss experience but

bear no relation to surety or insurance rates (Sinclair, Tr. 91, 93; Fait, Tr. 151; Moritz, Tr. 184; Ruesch, Tr. 457).

54. Fidelity is recognized as a separate line in the industry (see Finding 40, *supra*).

[18] 55. That a fidelity bond is sometimes written with a burglary policy, or combined with burglary insurance in a "crime" package, does not alter the finding that fidelity is a separate line. In cases wherein the two are combined in a package, they are accommodations to those customers who need both types of protection. Neither fidelity bond nor a burglary policy supplies the protection afforded by the other. Fidelity protects against employee dishonesty, burglary against outside crime. Thus, they are not functional substitutes.

56. Fidelity is separate and distinct from insurance and has no practical substitutes (Fs. 50-55, *supra*).

57. Surety is distinct from fidelity. Fidelity is sold primarily to financial institutions (Ruesch, Tr. 454; Culbertson, Tr. 1696). They paid 44.7 percent of the fidelity premiums earned nationwide in 1968 (CX 135). The majority of surety bonds are sold to construction contractors. Contractors paid 66.5 percent of the surety premiums earned nationwide in 1968 (CX 136; Ruesch, Tr. 45; Hepburn, Tr. 1206; Culbertson, Tr. 1686-1687). Contractors do purchase fidelity bonds, but they account for much less fidelity than surety (Sinclair, Tr. 92; CX 135). The two types of bonds serve different purposes: one assures the completion of a particular undertaking, the other protects an employer from loss due to dishonesty on the part of his employees. They are not functionally interchangeable. Rates, profits, earnings and predictable losses in the two lines are unrelated. The industry recognizes them as separate and distinct lines (Sinclair, Tr. 90-93; Fait, Tr. 148-151; Moritz, Tr. 184; Ruesch, Tr. 455-457).

58. Surety and fidelity are distinct submarkets within the general insurance industry, and therefore are separate product markets for purposes of this proceeding (Fs. 31-57, *supra*).

B. Geographic Market

59. The geographic market in which the effects of this acquisition must be assessed is the Nation as a whole (Fs. 60-73, *infra*).

60. Not only are American General and F&D licensed to do business and actually doing business in every state in [19] the country (Fs. 2, 15, *supra*), but the major fidelity and surety underwriters operate generally on a nationwide basis (Culbertson, Tr. 806).

The leading fidelity and surety writers are licensed to operate in all or nearly all of the states (Sinclair, Tr. 95-96; Moritz, Tr. 198-199; Culbertson, Tr. 806; Ruesch, Tr. 458-460; Wells, Tr. 1561-1562; Thorne,

Tr. 1648-1649). As set forth below, all of the leading fidelity and surety writers nationally in 1968, the year preceding the acquisition, were also among the top 15 writers in a significant number of states (CX 92):

Surety

Co. and National Rank		*Number of States in Which Ranked Among Top 15*
1	U.S. Fidelity & Guaranty	50
2	F&D	49
3	Aetna	50
4	Travelers	50
5	Fireman's Fund	44
6	American General	33
7	St. Paul	40
8	Hartford	42
9	Chubb	45
10	Seaboard	30

Fidelity

Co. and National Rank		*Number of States in Which Ranked Among Top 15*
1	Aetna	47
2	Continental	46
3	F&D	45
4	INA	43
5	Hartford	49
6	Fireman's Fund	44
7	Chubb	29
8	U.S. Fidelity & Guaranty	46
9	Employers of Wausau	49
10	Travelers	36

[20] In 1968, 8 of the top 10 writers in fidelity and 8 of the top 10 in surety were reported by the Surety Association among the top 15 writers in 40 or more states. Three of the nationwide top four surety writers were in the top 15 in every state.

61. Executives of several principal surety and fidelity bond writers testified that they look only or primarily at national market share figures in assessing their company's market position (Sinclair, Tr. 97, 100; Moritz, Tr. 202; Thorne, Tr. 804; Shrake, Tr. 1411; Wells, Tr. 1629, 1658).

62. Ratemaking in the fidelity and surety lines is generally done on a nationwide basis. The rates recommended by the Surety Association of America are generally countrywide in their application. Prior to 1970, those rates were mandatory for Association members (Pearson, Tr. 286-287; Hepburn, Tr. 403-404, 1188). Although Association members are now free to deviate from Association rates, the rates of a

particular company are generally uniform from state to state. Deviations that occur are not generally related to individual states but rather to individual jobs. They are not in response to underwriting experience in a particular state because state statistics simply do not provide sufficient experience, from an actuarial point of view, to devise legitimate rates for a state alone (Moritz, Tr. 201; Hepburn, Tr. 403-404, 1181-1182; Culbertson, Tr. 805-807, 817; Backman, Tr. 1947).

63. The principal bond writers operate throughout the country by means of branch or division offices located throughout the country (Sinclair, Tr. 95-96; Moritz, Tr. 198-199; Ruesch, Tr. 447, 458-468; Culbertson, Tr. 806, 831-832; Wells, Tr. 1561-1562, 1604-1605; Thorne, Tr. 1643-1644, 1644, 1648-1649).

64. Where bonds of significant size are concerned, the home office underwriters generally participate with the branch office in the underwriting (Sinclair, Tr. 76, 91; Moritz, Tr. 199-201; Ruesch, Tr. 460-461; Culbertson, Tr. 806-807).

65. The leading fidelity and surety writers generally, and F&D and American General in particular, have the [21] potential to compete, and in fact do compete, for business on a nationwide basis (Fs. 53-57, *supra*).

66. A local customer generally can purchase through his agent fidelity and surety bonds from bonding companies at any of their offices located anywhere in the country (Fs. 60, 63, *supra;* Culbertson, Tr. 806; Backman, Tr. 1942-1943).

67. A bond customer with operations in more than one state generally can purchase fidelity and surety bonds at one location to cover his entire multi-state operations (Culbertson, Tr. 805, 807, 822-823; Krupp, Tr. 963-965; Backman, Tr. 1952).

68. Accordingly, a customer in need of a fidelity or surety bond can turn to any one of the underwriters licensed to operate in his state. No matter how little an underwriter may have written in that state in the past, it represents an alternative source of supply to the customer. Thus, for the average bond customer, his alternative sources of supply are not limited to those firms which maintain branches or write a large volume of bonds in his state at any given time but extend throughout the entire country as a practical matter.

69. The Nation as a whole is therefore the appropriate geographic market in which to assess the effects of this acquisition (Fs. 60-68, *supra*). The parties are in agreement that the national market is an appropriate geographic market in these proceedings (CPF 78; RPF III-117).

70. Complaint counsel further contend that each state or, in the alternative, each of seven designated states,[4] also constitutes a relevant geographic market (CPF 163; CRB, p. 41). They have submitted state market share statistics which they argue indicate that the nationwide statistics drastically understate the degree of concentration in the fidelity and surety industries in some states (CPF 34, 41, 104, 107, 132, 135, 164).

[22] 71. A state may, in some circumstances, constitute an appropriate geographic market. However, the record in this proceeding does not support a finding that each state or any state is an appropriate market in which to assess the effects of this acquisition (Fs. 72-73, *infra*).

72. Complaint counsel's state market data in evidence in this proceeding are limited to a single year (1968) (see CPF 99).

The state market shares of underwriting companies can fluctuate widely from year to year. The loss or gain by a company of even one large contract, for example, particularly where allocated to a low-volume state, can make an enormous difference in that company's market share for that state (CPF 169; RPF III-122; RRB, p. 54; Culbertson, Tr. 817-820). Valid conclusions regarding concentration trends in state markets, changes in market shares and ranking, ease of entry or the state of competition cannot be drawn from one year's statistics alone. Therefore, no reasoned assessment of the effects of this acquisition on competition in any "state market" can be made on the basis of the evidence in the record.

73. The state figures in the record may be misleading in another respect. Because of allocation inconsistencies in many types of fidelity and surety bonds, the 1968 figures (CX 92) do not always accurately reflect where the bonds were written, and hence where the competition for any piece of underwriting business took place (RPF III-132-133; RPF III-137; see Fs. 129-136, *infra*). Even the figures for premiums generated by contract surety bonds, which are uniformly allocated to the state in which the work is performed (RPF III-136), do not indicate the place of actual competition, except in cases where the state of performance is also the state where the bond was written (RPF III-139-141).

V. *Nature of Competition*

74. Fidelity and surety bonds are sold both directly to customers and through agents and brokers. Most are written through agents and brokers (Sinclair, Tr. 75-76; Fait, Tr. 157; Moritz, Tr. 204; Culbertson,

[4] California, Florida, Illinois, Maryland, New York, Pennsylvania, and Texas.

Tr. 781-782, 788), but both American General and F&D also sold bonds directly (Robbins, Tr. 2523).

[23] 75. An agent is technically a representative of the company that appointed him (Culbertson, Tr. 785; Halpin, Tr. 908; McVay, Tr. 1350). Thus, when a policy is cancelled and a return premium is required, an agent must come up with his share of the return premium (Culbertson, Tr. 786). However, practically speaking, the agent represents the consumer (Culbertson, Tr. 783; Halpin, Tr. 907-908).

76. Most agents are not exclusive agents, but represent several bond companies. An agent can and does choose from among those he represents the one best suited for the particular needs of each of his clients (Culbertson, Tr. 785-786).

77. A broker is licensed to represent the consumer. When a policy is cancelled and a return premium required, the broker owes the underwriting company nothing. Like the agent, a single broker can choose from among many companies in selecting the one to serve his clients' particular needs (Culbertson, Tr. 786-787; Halpin, Tr. 907-908; McVay, Tr. 1350).

78. In general, it is the agent or broker, not the customer, who designates the company with which a customer's bond is to be placed. Most agents and brokers have a "stable" of three to six companies with which they place most of their business. For these reasons, bond companies compete for inclusion in agents' "stables," as well as at the direct customer level (Culbertson, Tr. 181, 781, 783, 788; Moritz, Tr. 201-202; Halpin, Tr. 965-966; Shrake, Tr. 1317-1318, 1322-1324, 1386-1387, 1364).

79. Except in the case of a very small bond, which an agent might be permitted to execute, agents do not make the decision to issue a bond (Sinclair, Tr. 75; Moritz, Tr. 179; CX 12, p. 5). Ultimately, it is the surety or fidelity underwriter in a company's branch or home office who makes the final underwriting decision. He must analyze the risk and determine whether the piece of business is one that would interest his company, and attempt to use his knowledge and experience to improve the quality of a risk he finds marginal (Sinclair, Tr. 77). When a surety underwriter is approached by a contractor with whom he has not dealt previously, he follows certain procedures tailored to the writing of surety bonds. The underwriter must obtain certain financial information. [24] He requests financial statements for the previous years. Most underwriters demand a certified audit. The underwriter may secure a contractor's questionnaire giving his history, length of time in the business, size of jobs he has performed, names of his sureties, description of his lines of credit and names of his suppliers. Then the underwriter checks this information with banks, creditors, sureties and

suppliers of the contractor, and may also order a Dun and Bradstreet credit report on the contractor (Sinclair, Tr. 77-79; Fait, Tr. 141-142).

80. Rates for fidelity and surety bonds were formerly established by the Surety Association of America for its members. Nonmembers were free to file and charge their own rates. Even member companies could vary their fidelity rates through the use of tables of judgment (Ruesch, Tr. 464-465; Culbertson, Tr. 794, 1711-1712; Hepburn, Tr. 1188; Backman, Tr. 2216-2217). At the present, Surety Association rates are advisory only, even for members (Pearson, Tr. 286-287; Hepburn, Tr. 1188).

81. Rates for surety bonds are not set on the basis of loss experience (F. 35, *supra*).

82. Surety and fidelity are profitable lines for insurance companies (Fait, Tr. 138; CX 9, p. 6; CX 10, p. 6; CX 11, p. 5; CX 14, p. 4; CX 63).

83. Fidelity and surety companies compete in terms of service, availability, and price (Moritz, Tr. 202-204; Krupp, Tr. 989; McVay, Tr. 1378-1380; Wells, Tr. 1601).

84. Service encompasses the advice and guidance given by bond companies to agents and consumers on the type and amount of bond needed as well as in the areas of loss prevention and salvage (Moritz, Tr. 203-204; Wells, Tr. 1599-1604; Culbertson, Tr. 1700-1701).

85. Services offered by bond companies to their agents and customers are based on their expertise in the industries in which their customers are involved (McVay, Tr. 1376; Wells, Tr. 1599-1600; CX 164, p. 8). The bond company advises the agent on the type and amount of bond his client needs (Wells, Tr. 1599-1600). If a risk is marginal, the underwriter will attempt to improve the quality of the risk (Sinclair, Tr. 77; Shrake, Tr. 1412). This might involve establishment of a loss prevention system by the client on the advice of the underwriter [25] (McVay, Tr. 1376-1377; Wells, Tr. 1600; Culbertson, Tr. 1701) or the institution of safety programs or elimination of hazardous conditions (Shrake, Tr. 1412-1413).

86. Other services provided by the bond companies could include guidance on the types of work and geographic areas the client should avoid (Wells, Tr. 1603; Culbertson, Tr. 1701). The underwriter might also check on the reliability of potential subcontractors. The bond company may help the client form a joint venture for a large job, or provide information about federal and state regulations covering construction work (Wells, Tr. 1603-1604). After the bond is written, the underwriter makes periodic status inquiries to check the progress of the construction, watch for problems, and assess the activities of the contractor (Sinclair, Tr. 79-80).

87. Salvage is another important service provided by bond compa-

nies. If a loss occurs on a bond, the bond company begins salvage work. On a fidelity bond, salvage could involve recovery of money or property taken from an employer. The bond company pursues the employee who took the money or property and attempts to recoup as much of the loss as possible. In the case of a construction bond on which the principal cannot complete the job, the underwriting company attempts to determine the best way of completing the project. The company will try to assist the principal in fulfilling his contract. If that is impossible, the surety and the obligee work out an agreement on how to finish the job. The surety company may succeed in recovering or preventing a large portion of the loss (Fait, Tr. 144; Wells, Tr. 1600-1602).

88. Service can be an important factor in the agent's or customer's choice of bonding company. F&D, for example, considers its service record a selling device; it feels that it offers excellent service that compensates for somewhat higher prices (Culbertson, Tr. 706, 741; CX 49). It attributes its position as a leading writer of court and fiduciary bonds to the expert assistance it provides to the legal profession (CX 12, p. 6). F&D's president testified that F&D competed with American General in furnishing service (Culbertson, Tr. 793).

89. Availability is the ability of an underwriting company to quickly approve and write bonds and can be a crucial factor in choosing a bond company. Agents have [26] discontinued placing bond business with firms that frequently delay in providing bonds (Krupp, Tr. 988-989; McVay, Tr. 1379; Shrake, Tr. 1396-1397).

90. Price competition in fidelity and surety rates has always existed and exists now despite the Surety Association's establishment of rates. Rate competition exists between F&D and American General for certain classes of bonds (F. 80, *supra;* Moritz, Tr. 203; Culbertson, Tr. 794; McVay, Tr. 1379).

91. Bonding companies compete on the terms described above at several levels. They compete at the direct customer level (F. 67, *supra*); at the agent level, to be chosen one of an agent's "regulars" or to draw business away from an agent's regular stable of companies; and they compete within an agent's "stable" with the other companies the agent regularly draws upon (F. 71, *supra*).

92. Reinsurance is the assumption of a portion of a fidelity or surety risk of the direct writing company by another insurance company (Sinclair, Tr. 82-83; Fait, Tr. 154; Moritz, Tr. 189-190). There are reinsurance companies whose entire business is reinsuring the primary writers (Culbertson, Tr. 798; Wells, Tr. 1615). The leading reinsurance companies for fidelity and surety are General Reinsurance Company, Employers Reinsurance Company, American Reinsurance, North American Reinsurance, and Insurance Company of North America (Sin-

clair, Tr. 84; Fait, Tr. 155; Moritz, Tr. 190; Johnston, Tr. 255; Thorne, Tr. 1682A-1682B).

93. Primary insurers sometimes enter into treaties with reinsurance companies which establish automatic writing lines or acceptances under which the reinsurer assumes a percentage of every bond above a given size written by the primary insurer (Sinclair, Tr. 83-84; Moritz, Tr. 190; Culbertson, Tr. 798, 1549).

94. However, all of the reinsurance in the fidelity and surety industries is not handled by the professional reinsurers (Culbertson, Tr. 1549). Many primary bond writers accept reinsurance on a facultative basis (Fait, Tr. 146; Culbertson, Tr. 1556; Wells, Tr. 1616). The facultative reinsurer evaluates each separate risk based on the underwriting information supplied by the company writing the bond and decides how much of each such risk to reinsure (Culbertson, Tr. 1549).

[27] 95. Some insurers who, based on net premiums, appear to be large factors in the industry in fact sell few bonds to purchasers of fidelity and surety coverage and function primarily as reinsurers. Since reinsurance is included in net premiums, such companies therefore have small amounts of direct premiums and relatively large amounts of net premiums.[5] For example, in 1973, Pacific Indemnity's net fidelity writings were $2,890,000 and its direct premium writings were $606,000. The net was almost 4.5 times as large as the direct (Backman, Tr. 2612-2613). Based on net figures, Pacific Indemnity ranked 21st in that year, and yet the direct figures indicate that the company was quite small (Backman, Tr. 2613-2614). Similarly, in 1972, the company's net fidelity premiums of $2,675,000 were more than 4.5 times as large as its direct premiums of $533,000 (Backman, Tr. 2614).

96. Allstate is another company that was more active in reinsurance than in direct writing. In 1973, the company wrote only $609,000 in direct fidelity premiums, but wrote $1,038,000 in net premiums. Its 1973 surety business presents a similar picture with direct writings of $343,000 and net of $2,053,000 (Backman, Tr. 2817-2819).

97. Pacific Insurance Company had net fidelity premiums of $3,040,000 but direct of only $1,705,000 in 1973. Its surety figures for that year are $1,456,000 in net and $422,000 in direct premiums written (Backman, Tr. 2777-2778).

98. The professional reinsurers and the reinsurance departments of primary underwriters do not market bonds directly to purchasers of fidelity or surety bonds and do not compete with the primary insurers (Sinclair, Tr. 84; Fait, Tr. 155; Moritz, Tr. 190; Johnston, Tr. 256, 263-264; Culbertson, Tr. 1550; Wells, Tr. 1616). They do not have personnel

[5] See Fs. 129-136, *infra*, on net and direct premiums.

in the field attempting to sell bonds to clients. (Culbertson, Tr. 1550). Reinsurers normally do not call on brokers or agents (Culbertson, Tr. 1550-1551). The originating company, not the reinsurer, handles claims and settlements (Culbertson, Tr. 1552). Reinsurers are not competitors in the markets for fidelity and surety bonds. See F. 135, *infra*.

[28] 99. Beginning in the early 1960's, the concept of combining several insurance coverages in a single policy (as in a "homeowner's" policy) began to be applied to the commercial insurance lines with the introduction of a "package" policy[6] commonly known as commercial multi-peril or "CMP"[7] (Culbertson, Tr. 695-697; Wells, Tr. 1636). Such policies usually include fire, contents, general liability, business interruption and crime. The "crime" portion of CMP often includes some fidelity (Sinclair, Tr. 110-111; Johnston, Tr. 259; Hepburn, Tr. 352-354; Ruesch, Tr. 417; Schraeder, Tr. 508; Culbertson, Tr. 695; Krupp, Tr. 967; Wells, Tr. 1569). Surety is not included in CMP-type policies (Sinclair, Tr. 82, 114; Fait, Tr. 143; Moritz, Tr. 180; Hepburn, Tr. 368; Spickard, Tr. 1134-1135; Culbertson, Tr. 1700).

100. The advantage in CMP policies and packages of policies put together by a single company is convenience and a lower price for the insurance customer. For purchasing all his coverage from one company, he receives a discount on the normal price that would be paid for separate policies (Culbertson, Tr. 709; Krupp, Tr. 971; McVay, Tr. 1354-1368; Wells, Tr. 1566A; RX 137, 146J; RX 164C, D; RX 165, 168, 174). Thus, CMP policies and packaging represent a form of price competition.

101. Nearly all the multiple line companies engage in packaging and actively promote their packages (RX 143, 146E).[7*]

[29] 102. In response to the threat posed by packaging, F&D developed a package policy of its own for financial institutions (Culbertson, Tr. 708-709; RX 96; CX 48, 51). This SMP (special multi-peril policy for financial institutions) combines property coverage on buildings, business and personal property, and liability coverages on premises and operations. Other coverage can be added to the basic SMP policy. The bankers blanket bond is not included in the SMP but may be written with it (CX 48, 51). F&D tries to package as much of its blanket bond business as possible. It is making "good strides" in this regard, but

[6] This differs from a "package of policies"; the latter is a "package" or group of coverages secured from one or more different insurance companies for various risks, put together, "stapled together," by an agent to fill his client's needs. See RPF III-14. In contrast, a CMP-type "package policy" is a *single* policy issued by one company covering multiple risks (Krupp, Tr. 966; McVay, Tr. 1353; Wells, Tr. 1569-1570, 1636).

[7] Other designations for the same or similar concept include "SMP" (special multi-peril) and "CBP" (comprehensive business policy), a specialized package used by Continental in addition to its general CMP writings (Ruesch, Tr. 467; Halpin, Tr. 933).

[7*] A related selling device is account selling, an effort to sell as many lines to a customer as possible. The record shows that account selling is limited to very large accounts ($100,000 to $300,000 annual premiums) and plays a minor role in surety, which always stands on its own (Culbertson, Tr. 678, 1745-1746; Wells, Tr. 1564).

still writes a substantial portion of its fidelity bonds outside of packages (Culbertson, Tr. 1702-1708). F&D considers itself highly competitive with regard to SMP-type packages for financial institutions (Culbertson, Tr. 1705).

103. A company wishing to enter the fidelity and surety fields faces certain barriers (see Fs. 147-148, *infra*).

104. Underwriters with training and expertise beyond that of the ordinary insurance underwriter are required. To train such underwriters requires several years, usually of on-the-job training. To become an expert takes longer. At Seaboard, for example, every surety bond is approved by a senior underwriter with 20 years' experience (Sinclair, Tr. 93, 105-107; Fait, Tr. 155-156; Moritz, Tr. 188; Scaglione, Tr. 222). To hire already trained underwriters can be difficult because of their scarcity and the high price they command (Halpin, Tr. 921; Thorne, Tr. 1649). The need for specially trained underwriters is even more pressing in contract bonds than in other surety bonds or in fidelity bonds. A contract bond underwriter must be familiar with financial statements, have a grasp of the construction industry, have a sense for the legal language of contracts and bonds and have considerable experience (Fait, Tr. 155-156).

105. Agents and brokers must be convinced to add a new entrant to their "stables" of underwriters with whom they have established relationships. This can be a difficult task (Fait, Tr. 158-159, 162-163, 165; Thorne, Tr. 1672).

106. Expertise and a reputation for it in the field is slowly acquired and is necessary to service customers, [30] reduce risks, conduct salvage and generally convince agents to place business (Fs. 76-77, *supra;* Moritz, Tr. 189, 204-205). Customers establish a relationship with their bonding company over a period of years (Krupp, Tr. 989-990; Shrake, Tr. 1388). The company becomes familiar with the client's performance in an industry, its financial position and integrity. Once familiarity and trust develop, the client is disinclined to switch to a new bonding company (Fait, Tr. 159; Krupp, Tr. 989; Shrake, Tr. 1388; Wells, Tr. 1605-1606). In addition, a long-standing relationship helps a client obtain a bond faster. Clients frequently need a bond on short notice. If they have dealt with a bonding company over a period of time, that company will already have the financial information on the client needed to determine whether it will write the bond. Expeditious action on a bond request is regarded as crucial by agents and clients. Agents have discontinued business with underwriters because of delay in obtaining bonds (Krupp, Tr. 985, 988-989; Shrake, Tr. 1396-1398).

107. Since the size of a bond it may write is measured by its capital and surplus (F. 132, *infra*), a company needs large amounts of capital

and surplus to provide the capacity to write the large bonds needed in today's market, and hence to compete successfully for agents and customers in the market (Fait, Tr. 162-164). Bond companies can expand their capacity through reinsurance treaties (Sinclair, Tr. 84-85; Backman, Tr. 2295-2296). However, the number of professional reinsurance companies are limited (Fait, Tr. 158-159). State requirements of capacity and surplus and sometimes of previous profitable writing experience must be met in order to be licensed (Sinclair, Tr. 95; Moritz, Tr. 198; Fait, Tr. 147). The licensing process can be time-consuming (Johnston, Tr. 254).

VI. *Structure of the Fidelity and Surety Markets*

A. Market Structure

108. In 1968, the year preceding its acquisition of F&D, American General ranked 12th nationally in the fidelity market in terms of direct premiums written, with direct premiums of $4.7 million and 3.3 percent of the market. It was sixth in surety, with direct premiums written of $15.2 million and 4.4 percent of the national market (Complaint and Answer, par. 5; CX 92, pp. 3-4).

109. The same year, F&D, the acquired company, was the third largest fidelity underwriter in the United States in 1968, with $10.4 million in direct premiums written, [31] approximately 7.4 percent of the national market. In the same year, F&D was the second largest surety writer, with 8 percent of the market and $27.7 million in direct premiums written (Complaint and Answer, par. 9; CX 92, pp. 3-4).

110. The resulting combination held first place in both the surety and fidelity markets, with approximately 12.4 percent of the surety market and 10.7 percent of the fidelity market, based on 1968 figures (CX 92; CX 176, pp. 286-287).

111. In 1968, the year preceding the acquisition, the top four firms in the fidelity market held 31.3 percent of that market in terms of direct premiums written; the top eight accounted for 53.5 percent. After the acquisition (based on 1968 figures), the top four accounted for 34.6 percent, and the top eight, 56.8 percent of the fidelity market (F. 145, *infra*).

112. In the surety market for 1968, the top four firms accounted for 30.6 percent of the market; the top eight for 49.8 percent. After the acquisition, the four largest surety writers had 35.0 percent of the market and the eight largest had 53.6 percent (F. 145, *infra*).

113. In 1968, the 15 largest fidelity writers alone accounted for 75.5 percent of the direct premiums written in the nationwide market. The top 15 surety writers wrote 69.8 percent of the direct premiums written

in that market in the same year. These leading firms, their shares and premiums written were as follows:

Fidelity

Company or Group	*Direct Premiums Written*	*% Of Total All Co.'s*
Aetna Life & Casualty Gp.	12,485,468	8.9
Continental Insurance Cos.	10,609,993	7.6
Fidelity & Deposit of Maryland	10,392,495	7.4
Insurance Company of North America	10,278,060	7.4
Hartford Insurance Company Gp.	9,377,242	6.7
Fireman's Fund American Ins. Cos.	7,380,037	5.3
Chubb & Son, Inc. Gp.	7,306,680	5.2
U.S. Fidelity & Guaranty Gp.	6,915,648	5.0
[32] Employers Insurance of Wausau Gp.	6,182,958	4.4
Travelers Insurance Gp.	5,686,457	4.1
St. Paul Companies	5,303,744	3.8
Maryland American General Ins. Gp.	4,591,744	3.3
Employers Commercial Union Gp.	3,318,787	2.4
Transamerica Insurance Gp.	2,912,612	2.1
Kemper Insurance Gp.	2,613,269	1.9

Surety

Company or Group	*Direct Premiums Written*	*% Of Total All Co.'s*
U.S. Fidelity & Guaranty Gp.	28,074,198	8.2
Fidelity & Deposit of Maryland	27,581,424	8.0
Aetna Life & Casualty Gp.	26,968,529	7.9
Travelers Group	22,187,816	6.5
Fireman's Fund American Ins. Cos.	16,311,269	4.8
Maryland American General Ins. Gp.	15,118,894	4.4
St. Paul Companies	14,338,480	4.2
Hartford Insurance Company Gp.	13,005,337	3.8
Chubb & Son, Inc. Gp.	12,739,169	3.7
Seaboard Surety Company	11,545,397	3.4
SAFECO Insurance Group	11,282,420	3.3
Reliance Insurance Cos.	10,976,203	3.2
Continental Insurance Cos.	9,971,940	2.9

Insurance Company of North America	9,681,491	2.8
United Pacific Insurance Gp.	9,204,699	2.7

(CX 92, pp. 3-4)

114. It is not possible to ascertain with precision from this record the total number of separate companies actively engaged in writing fidelity and surety bonds at the time of the challenged acquisition, nor to compare it with the number of writers for prior or subsequent years.

The Surety Association of America's membership lists for 1968 and prior years do not reflect all companies writing fidelity and surety in those years. At that time (and indeed until 1973 when membership requirements were eased), many companies who wrote considerable amounts of fidelity and surety were not members of the Association, but were merely subscribers or manual purchasers because they did not wish to adhere to then-mandatory Surety Association rates for members (see. F. 80, *supra*; [33] Hepburn, Tr. 1194, 1445-1449). Therefore, one cannot ascertain the change in numbers of *all* companies writing fidelity or surety between 1963 and 1968, for example, by comparing the Surety Association "membership and affiliate" figures for those years (160 and 194, respectively); the figures show change in membership only. The same is true of the 1973 figures, and that year there is an added element of distortion in that the Surety Association relaxed membership requirements by making its rates nonmandatory even for members (RX 226; Hepburn, Tr. 1194, 1445-1449).

The "Treasury List" is a list of surety writers who have been approved to write bonds on federal construction contracts (Culbertson, Tr. 859). Though inclusion on the Treasury List is legally required only for those companies writing bonds running to the Federal Government, the list is used as a guide to acceptable securities by other political bodies and by many private architects and engineers, and inclusion on the list enhances the image of a company (Fait, Tr. 153; Culbertson, Tr. 859-860). Until 1975, a company could appear on the Treasury List although it did not write any surety bonds or did not write a significant amount of surety (RPF, V-108-112; Wells, Tr. 1589; Robbins, Tr. 2573). And at the same time, certain companies write surety bonds but do not appear on the list (Culbertson, Tr. 860). Therefore, the 1968 list may not accurately reflect active writers of both fidelity and surety in that year. The Treasury List suffers from another defect in that it does not purport to show all companies grouped under common management, but rather groups some companies under common management and lists others separately (Wells, Tr. 1590; Backman, Tr. 2245-2247; Robbins, Tr. 2574). Thus, the Treasury List of 223 companies in 1968

(RX 92) does not accurately reflect the number of all independent, competing, active surety and fidelity writers for any given year, and valid conclusions regarding growth of fidelity and surety writers cannot be drawn from it.

Figures derived from Best's Aggregates and Averages and set forth in RX 223-225 are flawed in that companies under common ownership are not grouped (Backman, Tr. 2790-2794).

[34] Best's Executive Data Service, though available for only a limited number of years, does group fidelity and surety writers that are under common management. These figures are set forth in CX 42-45 and RX 43-52 and indicate that in 1968 there were 166 groups writing fidelity and 211 writing surety. This compares with 163 fidelity writing groups and 190 surety writers in 1967; and 167 fidelity writing groups and 246 surety groups in 1972.

B. Data Sources

115. The industry data contained in the record are derived from several sources: the annual statements required to be filed with a state's insurance commissioner by all companies operating in the state; compilation of those data by the various reporting companies; and certain other compilations of statistics produced by the Surety Association of America from its own reporting plan.

116. The annual statement is a detailed report of an insurance company's activities in a state, including a series of financial and statistical reports on the company's operation for the year. Every insurance company files an annual statement with each state in which it does business (Sinclair, Tr. 102; Fait, Tr. 151-152; Johnston, Tr. 255; Hepburn, Tr. 338-339). The statements are submitted under oath and are notarized. The form used was developed by the National Association of Insurance Commissioners, an organization of the insurance commissioners of the 50 states, and is similar for all states and all companies (Fait, Tr. 152; Hepburn, Tr. 338-340; Schraeder, Tr. 485-487).

On page 14 of the annual statement, the company's direct premium writings are broken down by line (including fidelity and surety) and by state (Fait, Tr. 152; Hepburn, Tr. 339-341).

117. The Spectator Company part of the Chilton Company, is a financial publishing company that publishes statistics on the insurance industry (Reddy, Tr. 293; Hepburn, Tr. 340).

118. Beginning with 1962, and until 1967, Spectator published a volume on the insurance industry entitled *Direct Writings*. It was essentially a printout from [35] Spectator's computer of the page 14 annual statement statistics filed by the insurance companies with the states. It contained and broke down data on direct writings by

company, line and state for all companies (Reddy, Tr. 295-302). Steps were taken to verify the accuracy and completeness of its data, and corrections were requested from the submitting companies where necessary. *Direct Writings* was a complete compilation of the page 14 material (Reddy, Tr. 302-306; Hepburn, Tr. 341-343).

119. The Surety Association of America is the trade association for fidelity and surety writers throughout the country. It also serves a rating or rating advisory function for its members, and gathers and disseminates statistics as the members' statistical agent before state insurance departments (Pearson, Tr. 272-273; Hepburn, Tr. 324).

120. The Surety Association produces a publication entitled *Fidelity-Surety Aggregates by State and by Type of Carrier Showing Fifteen Largest Writers*, based on annual statement page 14 data (CX 92-96; RX 74-81, 232-233; Hepburn, Tr. 337-339). From 1962 to 1967, inclusive, the page 14 material was supplied to the Association by Spectator, for virtually all companies doing business in the United States (see F. 118, *supra*). It was cross-checked with the Surety Association's own data and compared favorably with it. The final published results reflected nearly 100 percent of all companies' reported fidelity and surety experience in those years[8] (Hepburn, Tr. 340-343).

After 1967, Spectator stopped disseminating such data, and the Surety Association obtained the page 14 material directly from its affiliated companies and from state insurance supervisors. A spokesman for the Association testified that the results for 1968 gathered this way reflected approximately 98 or 99 percent of the total direct writings of the Nation's fidelity and surety writers (Hepburn, Tr. 344-346). A comparison of RX 43-52, **[36]** the direct premium figures for 1968 to 1972 given in Best's Executive Data Service, with RX 74-81, the Surety Association figures for those years shows them nearly identical. Since about 1970, the Surety Association has received the page 14 data through the A.M. Best Co. (Greene, Tr. 54; Culbertson, Tr. 804; see Fs. 124-127, *infra*).

121. The *Fidelity-Surety Aggregates* is made available to all the members of the Association, who use it to evaluate their performance and that of other companies, and to follow trends in competition (Sinclair, Tr. 97, 99-100; Fait, Tr. 149; Hepburn, Tr. 352; Wells, Tr. 1580-1581).

122. The Surety Association's analogous statistics for 1955 to 1961, inclusive, appear at RX 235, 236 and 237. These statistics too were derived from the annual statement page 14 data. For those years, the Association sought and received the statements directly from companies who were either members of, subscribers of, purchasers of the

[8] Excluding nonreported CMP related fidelity; on which see Fs. 137-143, *infra*.

Surety Association rate manual, or statistical reporters to, the Surety Association. The resulting data were not published annually, but for a 6-year period at a time. The published figures are somewhat less complete than for later years, and include some foreign writing, unlike statistics for later years; they do, however, reflect approximately 95 percent of the direct fidelity and surety writings nationwide for those years. The totals derived from compiling the page 14 data for each company were checked against page 7 of that company's statement (which shows total premiums by line of business for that company) but were not checked against other statistical reporting services. No company ever notified the Surety Association of any error, or correction to be made, in its data (CX 191).

123. The Surety Association has also, since 1965, collected and published certain data under its *Fidelity, Forgery & Security Uniform Statistical Plan of the Surety Association of America* (Hepburn, Tr. 314-315; CX 91). The plan serves as a basis for the uniform collection of fidelity and surety statistical data from the companies engaged in the direct writing of those lines. Over 90 percent of such companies participate in the plan (Hepburn, Tr. 315). The reporting companies are required to attest to the accuracy of their submissions by affidavits of the company official responsible for compilation of statistical [37] data (Tr. 317). Derived from this data are several documents in the record reflective of consolidated fidelity and surety experience (CX 64-65, 84; Tr. 318-322). Such documents are intended to be used primarily in ratemaking for the fidelity and surety lines. They are forwarded to all members and reporting companies, and as a matter of law to the insurance supervisors of each state in discharge of the Surety Association's responsibility as statistical agent of the companies (Tr. 322-324).

124. The A.M. Best Company publishes various compilations of data for the insurance industry, including the fidelity and surety lines (Greene, Tr. 520-522).

125. The Best Executive Data Service was introduced in 1963 to provide information on direct premium writings broken down by line and by state, in response to what Best officials felt was a clear market demand for such a product (Tr. 522-524). The Service is based on the annual statement page 14 data. Best's totals are checked against company totals, with cross-checking and balancing done for all companies. Should a company's annual statement be revised subsequent to its submission to Best, Best makes the necessary alterations in its report the following years. The editor of the Service testified that essentially all of the Nation's fidelity and surety business is thus reported (Tr. 525-529).

126. The Executive Data Service is purchased by state insurance authorities as well as by insurance companies, who use it for comparison purposes (Scaglione, Tr. 225-227; Greene, Tr. 522-528; Spickard, Tr. 1120, 1136-1137; Wells, Tr. 1579-1581).

127. Best's Executive Data Service statistics are in accord with Surety Association statistics for the same years (F. 120, *supra*).

128. It is found that the market data in the record are sufficiently complete and accurate to allow valid conclusions to be drawn regarding the effects of this acquisition. They have a common source — the annual statement page 14, have been checked to make certain they accurately reflect that source, and compare favorably with one another. They are the statistics [38] used by industry members and state insurance departments. Whatever their shortcomings,[9] they are relied upon by those who have most need of an accurate picture of competition in the fidelity and surety lines, and may logically and reasonably be relied upon here.

C. Use of Direct Premiums as an Appropriate Measure of Market Structure

129. Direct premiums are a more appropriate measure of market shares and the effects of this acquisition on competition in the relevant markets, than are net premiums (Fs. 130-136, *infra*).

130. Total premiums generated by the bonds written by a bond company (the "primary writer") are called "direct premiums" (Hepburn, Tr. 329-330; Culbertson, Tr. 795; Backman, Tr. 1968).

131. The primary writer may "spread the risk" on any given bond by ceding a portion of the bond and a proportional share of the direct premiums to a reinsurance company. Reinsurance is handled in either of two ways. The primary insurer may enter into a treaty with a reinsurance company, which establishes automatic writing lines or acceptances, whereby the reinsurer assumes a percentage of every bond above a given size written by the primary insurer (Sinclair, Tr. 83-84; Moritz, Tr. 190; Culbertson, Tr. 798, 1549). Or, the reinsurance may be handled on a facultative basis, by reinsurance companies or other primary writers. The facultative reinsurer evaluates each risk separately, based on the underwriting information supplied by the primary writer, to decide how much of each risk it would be willing to reinsure (Fait, Tr. 146; Culbertson, Tr. 1549, 1556; Wells, Tr. 1616; CX 80, pp. 25-26). What remains of the direct premiums thereafter (plus any reinsurance the company has itself assumed from other primary

[9] See Fs. 73, 137-143 for treatment of nonreported fidelity written as a component of CMP policies, and discrepancies caused by differences in allocation methods.

writers) constitutes the company's "net premiums" (Fait, Tr. 154; Culbertson, Tr. 795; Shrake, Tr. 1403; Backman, Tr. 1968-1969).

[39] 132. A bond writer has some control over its net premium volume from year to year. The amount of any single bond that may be written by a company is limited by law to a fixed percentage of its capital/surplus account (Sinclair, Tr. 85), but within the allowable range, management can decide how much of any risk it is willing to retain. Many factors go into such decisions (loss ratio, expenses, profitability) that pertain primarily to the internal (rather than the competitive) position of the company, and there is no consistency among net retentions by sureties or insurers (Culbertson, Tr. 800; Sohmer, Tr. 1095-1096; Backman, Tr. 2769-2770).

133. Because losses and expenses of a bond underwriter are related to net premiums (though not necessarily indicated by them), net premiums are the measure generally used for management reports on the internal position of a company (Moritz, Tr. 207-208; Culbertson, Tr. 796, 1545-1546; Spickard, Tr. 1132).

134. The parties agree that direct premiums are the best measure of market penetration. That is, direct premiums measure a company's production of bonds (the equivalent of sales in other industry) — its ability to get the business — indicating its initial competitive success in the marketplace (RPF IV-36; CPF 184; Halpin, Tr. 924; Spickard, Tr. 1131; Shrake, Tr. 1402-1403; Wells, Tr. 1588-1589; Culbertson, Tr. 1768-1769, 1795).

135. The use of net rather than direct premiums would have the effect of making it appear that several of the major reinsurance companies which produce little or no direct writing are in fact leading competitors in the fidelity and surety market (Fs. 92-98, *supra*). Such an impression would be misleading. The parties agree that reinsurers do not compete directly with the primary writers (RPF IV-48; CPF 205). That reinsurance companies make it possible for primary writers to underwrite larger bonds than their capital and surplus accounts alone would allow, does not, in my opinion, diminish the competitive strength shown by the primary writer in initially acquiring the underwriting business. The primary writer is successfully competing when it acquires business, regardless of the reinsurance phase which follows. Of course, if such a company were continually losing money in its underwriting business, the situation would be [40] different. The company could not in that case be considered a strong or successful competitor in that market.

Nor does the service provided by the reinsurer make it an indirect competitor of the primary writers. What it reflects is that the primary writer has successfully competed with other primary writers on two

levels: for the bonds it writes, and for the extra capacity provided by the reinsurer.

136. That the findings above are to the effect that direct premiums written provide a more appropriate measure than do net premiums of market shares and competitive strength, does not mean that direct premiums are the only measure. Both parties stress the importance of profitability in any assessment of a bond writing company's competitive strength (CPF 229; RPF IV-41, 42; RRB, p. 78). Profitability of the companies involved in this acquisition, most importantly F&D, has been considered carefully (see Fs. 5, 10, 28, *supra*). It is the Administrative Law Judge's opinion that profitability and direct premium writings together give the most accurate picture of a firm's competitive strength in the relevant markets.

D. The CMP Factor

137. As found above, packaging, in the form of CMP-type policies and otherwise, has become an established method of selling in the commercial insurance lines and such "packages" often include fidelity components (Fs. 99-102, *supra*).

138. The fidelity portion of a CMP policy is functionally interchangeable with a fidelity bond sold separately (Fait, Tr. 209-210; Hepburn, Tr. 352-354; Ruesch, Tr. 466; Culbertson, Tr. 698).

139. Surety is not included in CMP-type policies (Sinclair, Tr. 114; Fait, Tr. 143; Moritz, Tr. 180; Hepburn, Tr. 368; Spickard, Tr. 1134-1135; Thorne, Tr. 1682C; Culbertson, Tr. 1700).

140. Most underwriters do not report separately as fidelity that fidelity coverage written as a component of a package policy. Rather, those fidelity premiums are simply included in the "CMP" or "SMP" total. The fidelity component of CMP is consequently not reflected in the [41] regular industry statistics for fidelity premiums written (Hepburn, Tr. 352; Schraeder, Tr. 508-509; Greene, Tr. 539, 1237; Ruesch, Tr. 466-467; Culbertson, Tr. 700-702, 1742-1743).

141. F&D does report as fidelity the fidelity portions of its CMP policies (Culbertson, Tr. 724-725). Consequently, while industry totals for fidelity premiums written are understated by the amount of unreported fidelity written as part of CMP, F&D's share of the fidelity market may be slightly overstated by the regular industry statistics (F. 6 *supra;* Schraeder, Tr. 509; Greene, Tr. 539). The exact extent to which industry totals for fidelity premiums written are understated is not known (F. 140, *supra;* RRB, p. 106).

142. Counsel for both parties, either by projecting industry totals from the few statistics available from companies that do report CMP-related fidelity separately (RRB, pp. 103-106), or by relying on

estimates made by industry witnesses and industry reporting services (CPF 147-162), have proposed estimates of the volume of fidelity written as part of CMP policies. The president of F&D testified that he prepared in 1968 for management evaluation purposes an estimate of the fidelity portion of the CMP market that he considered sufficiently reasonable. His estimate was 1.6 percent for 1967 (Culbertson, Tr. 1716-1719; CX 31C; CX 165; RX 37). Complaint counsel suggest that the fidelity portion of CMP ranges from 3.3 percent to 10.9 percent of the total fidelity written, and that the average fidelity portion of CMP amounts to about 7 percent of the total industry-wide fidelity premiums as reported by the Surety Association for 1969 (CPF 156-159). Respondent, projecting data from three companies, suggests that CMP-related fidelity would be as high as 13.6 percent of the straight fidelity total for 1969. If the 13.6 percent figure were used *arguendo*, F&D's share of the fidelity market in 1969 would be reduced from 7.6 percent to 6.5 percent (RX 74). Respondent's calculations applied to 1973 Surety Association figures would likewise reduce F&D's share that year from 6.3 percent to approximately 5 percent (RRB, pp. 105-106; RX 232). However, the combined share of F&D/American General would still place it in the first place in fidelity in 1969 (RX 74) and in the fourth place in 1973, the same ranks it held without accounting for CMP-related fidelity (RX 74, 232).

143. For the purposes of this proceeding, it is found that the various estimates given by industry and trade association executives are sufficiently reliable to be used. Based on these estimates, the range from 3.3 percent to [42] 10.9 percent may be derived (CPF 155-159). The fidelity portion of commercial multi-peril policies is small, and the percentage of such fidelity represents only a small portion of the total fidelity market. The low figures that prevailed at the time of the merger will not materially affect the totals, market shares, and conclusions concerning that market.

VII. *Trend Toward Concentration*

144. Between 1959 and 1969, some 40 horizontal acquisitions (mergers) of U.S. companies writing fidelity and surety took place (CX 22, 25).

145. The 15-year period from 1959 to 1973 witnessed a trend toward

increased concentration in both the fidelity and surety markets, as set forth in the following table:[10]

[10] Use of net premium figures also shows increased trend toward concentration:

Net Premium Figures

Concentration in Fidelity and Surety Industries In Terms of Net Premiums Written

Fidelity

	Top 4		*Top 8*		
	(a)	(b)	(a)	(b)	(c)
1958	24.1		42.8		
1959	23.8		42.6		
1960	25.0		44.4		
1961	23.4		43.3		
	(RX 212)		(RX 212)		
1962	24.32	23.3	45.30	43.3	
1963	25.64	24.7	46.22	44.6	
1964	25.96	25.8	46.95	46.7	
1965	26.88	26.5	47.71	47.3	
1966	27.15	27.1	48.37	48.0	
1967	29.44	29.3	48.73	48.3	
1968	31.10	30.7	50.98	49.8	
1969	33.47	33.1	56.96	52.9	55.9
1970	35.36	34.9	56.79	52.6	54.9
1971	36.19	36.3	57.61	53.6	55.7
1972	35.19	35.2	58.86	54.5	56.7
	(RX 15-25)		(RX 15-25)		
1973	35.34	35.3	57.34	53.5	55.5
		(RX 212)		(RX 212)	(RX 214)

Surety

	Top 4			*Top 8*		
	(a)	(b)	(c)	(a)	(b)	(c)
1958	23.3			39.02		
1959	22.6			38.3		
1960	22.6			39.0		
1961	22.8			39.8		
	(RX 213)			(RX 213)		
1962	24.72	24.2		43.05	41.1	
1963	25.09	25.0		43.28	41.7	
1964	25.42	25.3		43.57	42.3	
1965	24.42	24.5		43.57	42.9	
1966	25.29	25.3		44.70	43.5	
1967	26.37	26.3		46.11	45.0	
1968	28.45	28.4		47.37	46.9	
1969	31.28	29.1	31.1	50.54	47.2	50.0
1970	31.27	28.9	31.2	49.81	46.8	49.4
1971	31.55	29.3	31.6	49.93	47.6	50.0
1972	29.76	28.1	29.8	48.05	45.6	47.7
	(RX 26-36)			(RX 26-36)		
1973	29.14	27.6	29.1	47.56	44.8	46.9
		(RX 213)	(RX 214)		(RX 213)	(RX 214)

(RX 15-36; RX 197-198; RX 212-213; RX 214 also used Best's Aggregates and Averages as a source)

Under "Top 4", 1959-1961, column (a) and column (b) are from RX 212. RX 15-36 include some reciprocals and Lloyd's writings, and group companies under common ownership. RX 212, 213 and 214 do not, hence the RX 15-36 figures are slightly larger for some years than are the corresponding figures taken from RX 212 and RX 213.

For "Top 8" Fidelity and "Top 4" and "Top 8" Surety figures: the 1969-1973 column (b) figures apparently omit the American General statistics. See RX 214. RX 214 adds the American General share to F&D's in its Top 8 statistics—the result for the Top 8 including American General is shown in column (c).

	Fidelity				*Surety*			
Year	*Top 4*		*Top 8*		*Top 4*		*Top 8*	
1959)	26.0	[24.6]	47.8	[45.0]	25.6	[23.7]	43.4	[41.0]
1960)[11]	27.5	[26.0]	49.3	[46.3]	25.6	[23.8]	44.6	[42.0]
1961)	26.2	[24.7]	47.7	[45.2]	26.0	[24.2]	44.6	[42.0]
1962	24.2		45.1		25.2		42.7	
1963	26.4		47.6		25.9		42.1	
1964	27.9		48.7		25.5		40.8	
1965	26.3		46.5		25.7		41.1	
1966	28.5		51.2		27.5		44.8	
1967	30.2		51.4		29.7		48.7	
1968	31.3		53.5		30.6		49.8	
1968 combined*	*34.6		*56.8		*35.0		*53.6	
1969 not combined	33.0		57.6		31.0		48.0	
1969*	*35.9		*60.5		*35.3		*51.7	
1970*	*35.7		*59.8		*35.5		*52.2	
1971*	*38.5		*60.4		*35.0		*52.6	
1972*	*37.9		*62.1		*33.3		*50.3	
1973*	*37.3		*61.4		*31.8		*48.9	

*F&D and American General shares combined in these figures (RX 74-81, 232-233, 235A, 236A, 237A; CX 119-134).

[43] 146. Not only did concentration increase overall during the period 1959-1973, but a small group of companies consistently held leading positions in the fidelity and [44] surety markets. In surety, the top four writers (F&D, Fidelity & Guaranty, Aetna, Travelers) remained the same from 1959 through 1973. In the fidelity market, F&D [45] (either alone, or, after 1968, combined with American General) was among the top four during each of the relevant 15 years. The Hartford group placed in the top four in all but one of those years, 1968, when it ranked number five. Insurance Company of North America was among the top four in eight years, with another year at the number five position. Aetna ranked in the top four for seven of those years and was number five in another year. U.S. Fidelity and Guaranty ranked in the top four for four years (CX 92, pp. 1-2; CX 93D,

[11] Complaint counsel argue (CRB, p. 56) that, since it was stipulated in CX 191 that the pre-1962 market share figures as set forth in RX 235-237 were reflective of only 95 percent of the fidelity and surety markets, adjustments must be made to arrive at accurate shares of the total markets for these years. Their method of adjustment is shown in CPF 96, n. 2, and results in the following shares, shown below, and in the brackets in the chart above:

	Fidelity		*Surety*	
Year	*Top 4*	*Top 8*	*Top 4*	*Top 8*
1959	24.6	45.0	23.7	41.0
1960	26.0	46.3	23.8	41.1
1961	24.7	45.2	24.2	42.0

These figures are, of course, somewhat speculative. At any rate, the difference between these "adjusted" shares and those set forth in Finding 83 is in no case large enough to be significant. Use of the "adjusted" figures would have no effect on the 15-year trend toward increased concentration found above.

E; CX 94C, D; CX 95C, D, E, F; CX 96C, D, E, F; RX 74-81; RX 233, 236-237).

147. As set forth in Finding 114, *supra*, this record does not permit an accurate determination of the numbers of companies writing fidelity or surety bonds, or both, over a long range time period. At any rate, the record in this proceeding fails to provide clear-cut examples of any *de novo* entrants into either the fidelity or surety market which have become significant factors in those markets during the last 15 years. All the evidence indicates an absence of any pattern of successful entry and rapid growth by new writers of surety or fidelity, such as would counter the anticompetitive effects of a horizontal merger involving a market leader (Moritz, Tr. 189; Scaglione, Tr. 224-225). The eight leading direct writers of fidelity in 1973, or their predecessors, had all written fidelity since at least 1955. The top eight direct writers of surety in 1973, or their predecessors, were also writing surety as early as 1955 (Backman, Tr. 2811-2812; RX 56, 232-233, 235-236). There were no [46] companies among the 15 largest direct fidelity writers in 1972 who did not write fidelity bonds at least as far back as 1962, nor were there any companies among the 15 largest direct surety writers in 1972 who did not write surety bonds at least as far back as 1962 (Culbertson, Tr. 1751-1752; RX 77, 81, 202-203, 208-209).

148. The companies cited by respondent as examples of recent, significant entry into the fidelity or surety markets prove, on examination, to be either not recent or not significant entrants.

a. Travelers, for example, is not a "recent" entry into the surety market. That company began writing surety in 1940 or 1941 (Shrake, Tr. 1305). In 1956, it was the ninth largest direct surety underwriter, in 1973 the third largest (if F&D's and American General's shares are combined for the latter year) (RX 233, 236A). Traveler's rise in ranking required a great deal of work. There is testimony in the record to the effect that the improvement in rank shown in the second 15 years of Travelers' surety experience required much more effort than for that of the first 15 years (Shrake, Tr. 1399). Travelers' progress, taking place as it did over a 30-year period, can hardly be described as "meteoric."

b. Similarly, Great American has had many years' experience in the underwriting of surety bonds. It was active in the business prior to 1955, "withdrew" between 1955 and 1965, and reactivated its surety operations in 1965 (Scaglione, Tr. 240; Culbertson, Tr. 850). It cannot be considered a "recent" entry. Nor can it properly be considered a significant factor in the industry. Its direct surety writings increased from about $5 million in 1968 to about $5.6 million in 1972, the company virtually standing still (RX 48, 52). It has recently suffered very unprofitable underwriting results in surety. William Shrake, an agent

with Collier-Cobb, a major agency for bonds, testified that Great American's service has deteriorated, and that it has recently been so slow to respond to requests that it is no longer an acceptable source of supply to Collier-Cobb. Indeed, that agency recently moved 34 contractor accounts from Great American (Shrake, Tr. 1396-1397).

c. Argonaut, founded in 1948 as a writer of workmen's compensation insurance, has entered the surety market somewhat more recently, first underwriting surety in 1959 (Thorne, Tr. 1641). However, it cannot be called a [47] significant factor in the market in the sense that it is a stable, successful writer of surety bonds, one to be reckoned with. Although it wrote $9.9 million in direct surety in 1972 and ranked number 15 that year (RX 52, 81), it suffered extremely bad underwriting losses in 1973 and 1974 (Thorne, Tr. 1673-1674). These losses were not solely the result of any general economic downturn but were caused partly by poor underwriting personnel who wrote bad bonds (Thorne, Tr. 1674-1675). The head of the company's bonding department admitted that the company had expanded too quickly (Tr. 1678-1679). As a result, the company has had to retrench drastically. It has fired four of its district managers (Thorne, Tr. 1677-1678) and has revoked the authority of the branches to write any new accounts prior to home office approval (Tr. 1660, 1675). Argonaut is re-underwriting its entire book of bond business in order to eliminate all marginal accounts (Spickard, Tr. 1128; Thorne, Tr. 1675). Volume has declined as a result, and a decrease of $1 million or 8 percent was projected for 1974 (Thorne, Tr. 1679). Argonaut's ability to service customers quickly has been affected to the extent that Collier-Cobb, a major agency, at present does not consider Argonaut to be a viable source of bonds for its clients (Shrake, Tr. 1398). The other companies cited by respondent present similar pictures. Either they are not truly recent entries[12] or they have not exhibited the rapid and substantial gains in size and strength that would mark a truly significant new entrant.[13] [48]

VIII. *Anticompetitive Effects of the Acquisition in the Fidelity and Surety Markets*

149. Prior to American General's acquisition of F&D, American

[12] Employers of Wausau: Halpin, Tr. 875; Safeco: RX 203 revised, CRB, p. 30; Kemper: CPF 233, Halpin, Tr. 887, 912, 935, RX 52; Western Surety: RPF V-178(a); Union: RX 202 revised; Allegheny Mutual: CRB, p. 34, RPF V-178(h); Home: RPF V-178(b), CRB, p. 33.

[13] For example — Employers: Halpin, Tr. 87, CRB, p. 30; Unigard: Tr. 852, 857, RX 144B, RX 241; Allstate: CPF 234, RX 47, 52; Backman, Tr. 2818; Kemper: CPF 233, RX 52J; Commercial Union: Backman, Tr. 2829-2830, RPF V-154; Leatherby: Culbertson, Tr. 1755, CPF 237, RPF V-158, V-161; Northwest National: Tr. 853, RX 47, 52, CX 25, CPF 236; Surety Co. of California: RPF V-169; American Bonding: Tr. 251, 262, RPF V-176; Capitol Indemnity: RX 47, 52, RPF V-177; Crum & Foster: RPF V-178(c), CPF 246; Cumis: CRB, p. 34; New Hampshire: RPF V-178(e); Vigilant: CX 188(b), CPF 239; Personal Service: RX 52, CRB, p. 34; Allegheny Mutual: RPF V-178(h), RX 52, CRB, p. 34; International Fidelity: RX 52, RPF V-178(i); Home: RPF V-478(b), CRB, p. 33.

General and F&D competed for underwriting business in the nationwide fidelity and surety markets (Culbertson, Tr. 793; Robbins, Tr. 1281, 2523; Shrake, Tr. 1394, 1399; Fs. 2, 15, 60, 65, *supra*). This acquisition eliminated substantial actual competition between the two companies.

150. The acquisition of F&D by American General strengthened the market position of American General by increasing its market share considerably (F. 110, *supra*).

151. The acquisition substantially increased concentration in the fidelity and surety markets (Fs. 108-112, *supra*).

IX. *Discussion*

A. The Relevant Product Markets

A threshold issue in this case is, of course, the determination of the product dimensions of an effective area of competition within which the legality of the challenged acquisition must be tested. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 324 (1962). There is, in this case, a dispute regarding the product market issue. Complaint counsel contend that the business of underwriting fidelity bonds and the business of underwriting surety bonds constitute separate product markets for Section 7 purposes, each distinct from the other and both from other lines of insurance business, such as life/health and property/liability. Respondent does not seriously dispute the proposition that fidelity and surety are separate and distinct product "lines" but insist they are properly included in broader insurance markets (RPF III-1). Respondent's arguments focus on the proposition that (1) fidelity and surety are an integral part of the broader property/liability insurance in terms of marketing, and (2) there are substitutes for corporate fidelity and surety bonds. Thus, respondent would lump fidelity bonds together with all forms of "dishonesty insurance," such as burglary insurance. And the surety bond market would include bank letters of credit, personal surety and "self-insurance." **[49]** Respondent argues that a realistic evaluation of the effect of the merger must take into account these two factors.[14]

It is well settled that the outer boundaries of a product market are determined by the product and its close substitutes from the functional and economic standpoints. Within this broad market, however, well-defined submarkets may exist which in themselves constitute product markets for Section 7 purposes. And, if there is a reasonable probability that the acquisition may substantially lessen competition in *any* economically significant *submarket*, the acquisition is proscribed by

[14] This last argument of respondent will be discussed hereinafter, pp. 60-61, *infra*.

Section 7. *Brown Shoe Co.* v. *United States, supra*, at 325. The guidelines in this regard have been well established by the Supreme Court. In *Brown Shoe Co.* v. *United States, id.*, the Court laid down the following criteria:

> * * * The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. * * * [Footnote omitted.]

The Court has also made clear that the presence of *all* of the seven factors enumerated above is not required. *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 275, 276-277 (1964).[15]

The Administrative Law Judge is also reminded that the relevant product market must be determined by the nature of the acquiring and acquired firms and by the nature **[50]** of competition they face. Submarkets should not be contrived in disregard of a broader product market which has economic significance. Nor should product markets be defined to include all substitutes in disregard of the congressional purpose in adopting the amended Section 7 and to obscure the true effect of a merger between sellers of any one of the substitutable products. *Brown Shoe Co.* v. *United States, supra*, at 326-327; *United States* v. *Continental Can Co.*, 378 U.S. 441, 456-457 (1964); *United States* v. *Phillipsburg National Bank*, 399 U.S. 350, 359-360 (1970).

This case involves a horizontal acquisition — the acquisition by American General, an all-lines insurance company and a writer of fidelity and surety bonds, of F&D, a firm largely specializing in fidelity and surety bonds. It is therefore logical to start the product market analysis with fidelity and surety bonds.

Viewed in the light of controlling guidelines discussed above, the record clearly demonstrates that fidelity and surety constitute separate and distinct markets (or submarkets) for Section 7 purposes. Respondent does not seriously dispute the fact that fidelity and surety are separate "lines." The record shows that, in terms of the *Brown Shoe* indicia, fidelity and surety are distinct from each other and each from the other lines of life/health or property/liability lines of insurance.

Most obvious are peculiar uses, distinct prices, and the absence of price sensitivity. Fidelity bonds and surety bonds have separate uses and cannot be used interchangeably with each other or with any other line of insurance (Fs. 36, 55, 57). Both have distinct prices. There is no

[15] In that case, difference in price and absence of price sensitivity were sufficient for the Court to hold that insulated aluminum conductor constituted a product market distinct and separate from that for copper conductor although they are made by the same manufacturers using identical production facilities and have complete functional interchangeability and common customers.

discernible relationship between the prices of fidelity bonds and surety bonds. Surety production, profits and losses fluctuated independently of those of fidelity, and the experience of each was unrelated to that of other insurance lines (Fs. 35, 53, 57). In addition, the record indicates that the industry and the public recognize the fidelity bond business and the surety bond business as two distinct and significant economic entities, separate from each other and from the property/liability insurance industry (Fs. 40, 54). The four above-named factors are sufficient to support a conclusion that fidelity and surety are valid submarkets for the purposes of this [51] case. However, there is further evidence in the record to indicate that fidelity and surety serve largely separate customer groups (Fs. 50, 57).

B. The Relevant Geographic Markets

The parties agree that the Nation as a whole is an appropriate geographic market in which to test the effect of the challenged acquisition. However, there is a vigorous dispute regarding the validity of state markets. Complaint counsel argue that each of the states in the United States is a separate market for the purposes of this case or, alternatively, that at least each of the seven States of California, Florida, Illinois, Maryland, New York, Pennsylvania, and Texas, constitutes a separate geographic market (CRB, pp. 41-42). Respondent advances two principal arguments in opposition. First, respondent contends that the Commission's December 5, 1972 opinion and order remanding the case to the Administrative Law Judge foreclosed, as a matter of law, the issue of state markets from this case (RB, pp. 32-34).[16] Secondly, respondent argues that the record affirmatively shows that states are not economically significant markets (RB, pp. 34-42).

The guidelines for delineation of geographic markets have been clearly laid down by the Supreme Court. The paramount purpose of defining a geographic market is, of course, to determine the geographic dimensions of an effective area of competition in which the legality of a given acquisition must be tested. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957); *Brown Shoe Co.* v. *United States, supra*, at 324. In this sense, "[t]he criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market." *Brown Shoe Co.* v. *United States, supra*, at 336. Thus, although in some circumstances the geographic market may be as small as a single metropolitan area, the market selected in all cases [52] must "both 'correspond to the

[16] It is my view that the Commission's remand order did not in terms foreclose the state market issue and that, therefore, I was bound to take evidence on this issue.

commercial realities' of the industry and be economically significant," and not "formal" or "legalistic" *id.* at 336-337.

Viewed in this light, the record evidence falls short of demonstrating that any of the seven states designated by complaint counsel constitutes a valid section 7 market. In my view, the record as a whole shows that "there is nothing sacred about the boundary lines of a state" in the operation of fidelity and surety bond businesses. *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 602 (S.D.N.Y. 1958).

First, there appears to be no significant economic or legal barriers "that significantly impede the entry of new competitors" into a state. *United States* v. *Pabst Brewing Co.* 384 U.S. 546, 557 (1966). Second, the record does not show any discernible pattern of production or distribution peculiar to any state. Third, there is no convincing evidence to show that fidelity and surety rates in fact differ significantly from state to state, although a number of states have adopted "open competition" statutes some years ago. It is true that state data for the fidelity and surety bonds are published by the Surety Association of America (a trade association) and Best's Executive Data Service (a commercial statistical agency which appears to enjoy full cooperation of both the states and the industry) and that the latter data are purchased and used primarily as a management tool by industry members. However, state market shares and rankings appear to fluctuate widely. Furthermore, they are misleading due to substantial distortion incident to the fact that allocation of a large piece of business to one state can substantially overstate a firm's position in that state and thus fails to reflect the true picture accurately and fairly. Therefore, complaint counsel's contention that each of the States in the United States, or each of the seven named states, constitutes a relevant geographic market in this case is rejected. See Fs. 72-73.[17] **[53]**

C. The Market Structure and the Probable Effect of the Acquisition

Prior to its acquisition of F&D, American General, through one of its operating subsidiaries (Maryland Casualty Company), was engaged in the fidelity and surety bond businesses in direct competition with F&D. Therefore, a direct and immediate result of the challenged acquisition is the elimination of that actual competition between the two firms. *Brown Shoe Co.* v. *United States, supra*, at 335. Section 7, however, does not condemn every merger between competing firms. It merely proscribes those mergers having demonstrable anticompetitive effects.

[17] Even if the seven state markets designated by complaint counsel were to be accepted as relevant geographic markets, it is my determination that the record does not permit formulation of basic findings which may support a conclusion with respect to the legality of the challenged acquisition in any of the seven states.

Id. at 319. Disclaiming any simple quantitative test of illegality, the Court states, *id.* at 334-335, that the effect upon competition of a horizontal arrangement depends on its character and scope, and that its validity will depend on such factors as:

> [T]he relative size and number of the parties to the arrangement; whether it allocates shares of the market among the parties; whether it fixes prices at which the parties will sell their product; or whether it absorbs or insulates competitors. * * *.

A year later, however, the Court began its discussion of the legal standard applicable to horizontal mergers by admonishing against "the danger of subverting congressional intent by permitting a too-broad economic investigation" and indicated that "in any case in which it is possible * * * to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 362 (1963). Specifically, the Court ruled that a horizontal merger which creates a firm having an undue share of the market (30 percent) and thereby substantially increases concentration among the leading firms (by at least 33 percent) is a presumptive violation of Section 7. *Id.* at 363-365. The Court's rationale for this clear advancement from *Brown Shoe* need be remembered.

In *Philadelphia National Bank,* the Court reemphasized the need to give full effect to the central purpose of Section 7 by not merely preserving existing competition but also by arresting anticompetitive tendencies in their incipiency. However, the Court was keenly aware of the [54] "complex and elusive" nature of relevant economic data. Therefore, in view of the "intense congressional concern" with the trend toward concentration, elaborate proof of market structure, market behavior, probable anticompetitive effects may be dispensed with in cases where the merger is inherently likely to lessen competition substantially. *Id.* at 362-363. In applying this principle to the case, the Court stressed the economic objection to concentration and relied on the economic theory on oligopoly in condemning the merger. *Id.* at 363-366.

The following year, the Court made it clear that the elimination of significant competition between the merging firms which are major competitive factors in the relevant market, of itself constitutes a violation of Section 1 of the Sherman Act without the need for further economic inquiry into its competitive effect. *United States* v. *First National Bank & Trust Co. of Lexington,* 376 U.S. 665, 669-673 (1964). In the same year, in *United States* v. *Aluminum Co. of America,* 377 U.S. 271 (1964) (*"Rome Cable"*), the Court condemned, in a highly concen-

trated industry, an acquisition which added but 1.3 percent to the acquiring firm's 27.8 percent share of the relevant market. In that case, the Court, in addition to economic objections to concentration, emphasized the social objection to concentration trend in the American economy, which the Court had adumbrated earlier in *Brown Shoe*. *Id.* at 280-281. *Brown Shoe Co.* v. *United States*, *supra*, at 315-316.[18] In *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966), the Court elaborated a social theory of concentration and condemned an acquisition by the third ranking grocery store chain of the sixth ranking firm, resulting in 7.5 percent share of the relevant market, against the background of an evident merger trend and a steady decline in the number of firms in the market. *Id.* at 272-278. During the same term, the Court, in *United States* v. *Pabst Brewing Co.*, *supra*, following the *Von's Grocery* rationale, condemned a horizontal acquisition in the beer industry which made the [55] acquiring firm the fifth largest with 4.5 percent in the national market, the largest with 24 percent in the Wisconsin market and a leading firm with 11.3 percent in a 3-state area. *Id.* at 550-553.

However, in the most recent Section 7 case involving a horizontal acquisition, *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974),[19] the Court upheld a 1959 merger of two leading coal companies which increased the market share of the two largest firms in the two relevant geographic markets from 45 percent to 48.6 percent and from 44 percent to 52.9 percent, respectively, between the period 1959-1967. *Id.* at 495. It was also shown that in one of the markets, the number of coal firms declined from 144 in 1957 to 39 in 1967. *Id.* at 495. Against this background, the Court sustained the trial court's decision which sanctioned "further examination of the particular market." The Court agreed that due to the new peculiarities of coal economy, namely, dwindling coal demands, scarcity of economical coal reserves and long-term requirements contracts, statistical evidence of past coal production was considerably less significant than in other cases, for the focus of competition in the coal industry is not on the sale of coal already produced but is the procurement of new long-term supply contracts, which is limited by a company's uncommitted reserves of recoverable coal. Viewed in terms of present and future reserve prospect, rather than in terms of past production, the acquired company was a far less significant factor than the past production statistics indicated. *Id.* at 498-503. The Court also relied on the trial court's finding that the rapid

[18] See also Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 247-248 (1960) (hereinafter "Bok, *Mergers and the Clayton Act*").

[19] See Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*. 75 Columbia L. Rev. 282, 310-311 (1975). *Cf. Kennecott Copper Corp.* v. *F.T.C.*, 467 F.2d 67 (10th Cir. 1972), *cert. denied*, 94 S. Ct. 1617 (1974).

and drastic decline in the number of firms occurred "not because small producers have been acquired by others, but as the inevitable result of the change in the nature of demand for coal." The Court characterized this finding as "most significant." *Id.* at 492-493. For the purposes of the instant case, then, *General Dynamics* stands for the proposition that market share statistics and evidence of concentration of the magnitude involved in *Philadelphia National Bank* and *General Dynamics* establish a rebuttable presumption of illegality. See *United States* v. *Marine* [56] *Bancorporation*, 418 U.S. 602, 631 (1974); *United States* v. *Citizen's & Southern National Bank*, 43 U.S.L.W. 4779, 4789 (U.S. July 17, 1975). With these controlling cases and broad principles enunciated therein in mind, I now turn to the evidence in this case.

(1) The Elimination of Direct Competition Between American General and F&D

In 1964, American General established a substantial position in both the fidelity and surety markets by absorbing Maryland Casualty Company (F. 5). To the extent that American General and F&D competed in the fidelity and surety business prior to the challenged acquisition, the acquisition will eliminate that competition, which was substantial by any standard (F. 149). The two firms wrote the same types of bonds (Woodson, Tr. 1031-1032; Shrake, Tr. 1394). They competed directly and through their agents (Robbins, Tr. 2523, 2528-2529).

Competition in fidelity and surety has three elements: service, availability and price. Service embraces a broad range of services bond underwriters perform, utilizing their specialized skills, training and experience. It includes the guidance and counsel given to agents and customers. For example, if an underwriter finds a risk to be marginal, he may endeavor to improve that risk, using his expertise (Sinclair, Tr. 77). Availability involves the speed with which the bond underwriter makes a decision on accepting and writing the bond. In many situations requiring a bond, usually the time is of the essence (Krupp, Tr. 988-989; McVay, Tr. 1379; Shrake, Tr. 1396-1397). Price competition arises in the rates charged by deviating companies, whose rates deviate 15-25 percent from the Surety Association rates. Different companies may charge different rates as experience and judgment factors are applied to effect variations from basic rates (F. 80).

Equally important, the challenged acquisition absorbs F&D, a leading, profitable, prosperous, well-established, independent specialist in the fidelity and surety markets into an insurance holding company with operating subsidiaries in life/health and property/liability insurance lines. Before the acquisition, F&D, for many years, had been

among the top 3 firms in both markets. F&D wrote business nationwide and maintained 51 branch and service offices, which accounted for two-thirds of a total of [57] some 1100 employees (CX 17, pp. 90-91). A conservative and highly service oriented company, its business, earnings and profits showed consistent growth over the years (Fs. 16, 27, 28). Its loss ratios were among the most favorable in the markets (F. 28). To paraphrase the Court's language in *Rome Cable*, preservation of F&D, rather than its absorption by an insurance conglomerate, will keep it as an important competitive factor. *United States* v. *Alcoa*, *supra*, 377 U.S. at 281.[20]

(2) The Increase in Concentration in the Fidelity and Surety Markets

Before discussing the structure of the fidelity and surety markets, one issue must be resolved. There is a sharp dispute between the parties as to which of direct premiums and net premiums are the appropriate basis for measuring the market shares of the firms in the relevant markets. In my view, the record amply demonstrates that direct premiums are comparable to sales in other service industries and are the most important indicia of market power and competitive performance of fidelity and surety underwriters. Although net premiums do reflect a firm's financial strength in some measure, they do not reflect accurately the competitive position of the firms in the marketplace. Also, net premiums can be substantially affected by a firm's internal management decision (F. 132). Several insurance executives testified that their companies use direct premiums to measure their performance and position in the market (*e.g.*, Halpin, Tr. 924; Spickard, Tr. 1131; Shrake, Tr. 1402-1403; Wells, Tr. 1588-1589). Furthermore, to the extent that net premium figures exaggerate the importance of reinsurance firms, which admittedly do not compete for the sale of bonds to customers, net premium figures result in serious distortions of market structure and are misleading. For these and other reasons (Fs. 130-136), it is concluded that direct premiums are the more appropriate measure of the market shares of both fidelity and surety bond writers. [58]

(a) The Structure of the Surety Market

In 1969, the year of the acquisition, the total direct surety premiums of all companies were in excess of $366 million, and the surety industry constituted a substantial economic activity. In terms of direct premiums, American General's 1969 acquisition represented the absorption of

[20] See also Bok, *Mergers and the Clayton Act*, *supra* n. 18, at 247-248, 305-306; Brodley, *Oligopoly Power Under the Sherman and Clayton Acts – From Economic Theory to Legal Theory*, 19 Stanford L. Rev. 285, 341 (1967).

the second ranking firm, with 8.0 percent of the market, by the seventh ranking firm, with 4.3 percent of the market, which made the combined American General group the top ranking firm with 12.3 percent of the market (RX 78). In 1970, the year following the acquisition, the combined share increased slightly to 12.4 percent, keeping the combined group in the top place (RX 79).

In 1968, the year preceding the acquisition, the four largest firms accounted for 30.6 percent of the market, and the eight largest, for 49.8 percent. The corresponding figures for 1969, giving effect to the American General-F&D merger, were 35.3 percent and 51.7 percent, respectively, and for 1970, 35.5 percent and 52.2 percent, respectively. Thus, the challenged acquisition substantially increased concentration in the surety market (F. 112).

(b) The Structure of the Fidelity Market

In 1969, the year of the acquisition, the total direct fidelity premium of all firms were in excess of $177 million. In terms of direct premiums, the challenged acquisition represented the absorption of the fifth ranking firm, with 7.4 percent of the market, by the eleventh ranking firm with 2.9 percent, which made the combined group the top ranking firm, with 10.3 percent of the market (RX 74). In 1970, the year following the acquisition, the combined share declined slightly to 9.7 percent, but still placed the combined group at the top place (RX 75).

In 1968, the year preceding the acquisition, the four largest firms accounted for 31.3 percent of the fidelity market, and the eight largest, for 53.5 percent. The corresponding figures for 1969, giving effect to the American General-F&D combination, were 35.9 percent and 60.5 percent, respectively, and for 1970, 35.7 percent [59] and 59.8 percent, respectively. Thus, the challenged acquisition substantially increased concentration in the fidelity market (F. 111).

(3) The Trend Toward Concentration

The record demonstrates that during the decade preceding the acquisition, both the fidelity and surety markets experienced a clear trend toward concentration and that the adverse trend was exacerbated in the years following the challenged acquisition.[21] As for fidelity, the four- and eight-firm concentration gradually increased from 26 percent and 47.8 percent, respectively, in 1959,[22] to 31.3 percent and 53.5 percent, respectively, in 1968, and to 37.3 percent and 61.4 percent,

[21] Bok suggests a 5-10 year period for concentration trend analysis. Bok, *Mergers and the Clayton Act*, *supra* n. 18, at 314.

[22] See n. 10, pp. 43-44, *supra*.

respectively, in 1973, the most recent year for which data appear in the record.[23] For surety, the picture is just as discouraging. The four-firm and eight-firm concentration gradually increased from 25.6 percent and 43.4 percent, respectively, in 1959,[24] to 30.6 percent and 49.8 percent, respectively, in 1968, and to 31.8 percent and 48.9 percent, respectively, in 1973 (F. 145).

In addition, the record shows that a substantial number of fidelity and surety bond underwriters were absorbed by their competitors or by other firms during the 1957-1969 period (CX 22, 25). In any event, the record indicates that the fidelity and surety markets are among the most highly concentrated in the various segments [60] of the insurance industry (Backman, Tr. 2303). And the challenged acquisition intensified the existing concentration. Respondent's contentions that the number of firms in the relevant markets has substantially increased during the recent years are not borne out by the record (Fs. 114, 147-148).

In conclusion, against the once moderately concentrated structure of the surety and fidelity markets now approaching advanced oligopolies, the challenged acquisition cannot be sanctioned without doing grave violence to the clear congressional mandate that the Commission should arrest anticompetitive tendencies in their incipiency. Should the Commission approve the instant acquisition, it would no doubt be called upon to approve similar horizontal acquisitions by American General's competitors in the future. "The oligopoly Congress sought to avoid would then be furthered and it would be difficult to dissolve the combinations previously approved." *Brown Shoe Co.* v. *United States*, *supra*, at 343-344.

D. Respondent's Defense

In its defense, respondent first contends that, because of the incompleteness and inaccuracies of market share statistics in the record, complaint counsel failed to carry their burden of establishing the illegality of the challenged acquisition. More specifically, respondent argues that the surety market analysis must include various substitutes for corporate surety, such as bank letters of credit and personal surety (RRB, pp. 26-27). However, the record evidence indicates that these substitutes have historically been subjected to various restrictions, their use is "dying out," and that their effect, if any, upon the conclusion to be reached with respect to the competitive

[23] On the basis of a 3-year cycle commonly used by the fidelity industry, the appropriate year for which to examine the post-acquisition results would be 1971. For that year, the four-firm and eight-firm concentration were 38.5 percent and 60.4 percent, respectively.

[24] See n. 10, pp. 43-44, *supra*.

effect of the challenged acquisition would be negligible. For example, F&D's president could not name a single account which had been lost to any of these "substitutes" in his experience (Fs. 41-45).

As for the fidelity market, respondent argues (1) that fidelity should include all forms of the so-called "dishonesty insurance," such as burglary insurance, and (2) that the record evidence regarding fidelity is totally unreliable because of its failure accurately to account **[61]** for the fidelity portion of the commercial multi-peril insurance ("CMP") (RRB, pp. 27, 35, 99-106; RPF III-50). The function of fidelity is so obviously distinct from the other lines of "dishonesty insurance" (*e.g.*, burglary insurance) that the argument is patently unsupportable. Furthermore, the record evidence does not show that trade realities in the marketing of fidelity bonds require fidelity to be lumped together with the other lines of property/liability insurance.

Respondent's second argument regarding the reliability of record evidence on the size of fidelity market is rejected. It is true that available industry statistics introduced by complaint counsel do not purport to show accurately *all* CMP-related fidelity volume. However, they are sufficiently reliable for the purposes of this proceeding. The 1963-1970 data compiled by The Surety Association show a range of percentages (of fidelity within CMP) to be between .9 and 1.5 percent (CX 151; Hepburn, Tr. 1214-1216, 1227, 1229, 1466-1467). The 1969 data compiled by The Insurance Service Office (ISO) was .8 percent (Gallant, Tr. 3202-3205, 3207, 3215-3216). These data appear to be generally consistent with individual estimates given by several industry executives at trial (Ruesch, Tr. 467-468; Spickard, Tr. 1135; McVay, Tr. 1372-1373; Wells, Tr. 1606-1607). On the other hand, respondent's projection based on 3-firm data is patently unreliable. Although it would have been possible to secure more accurate and complete data with respect to CMP-related fidelity volume from individual firms, it would have been expensive and time-consuming. In any event, the record is sufficiently clear that the distortions in the fidelity market share figures incident to CMP-related fidelity are not of such magnitude as to affect materially the basic conclusions with respect to the market structure and concentration trend of the fidelity market[25] (see Fs. 142-143).

[62] Respondent's next argument is that F&D, because of its inability fully to participate in the CMP and the so-called package- and account-selling techniques, had been losing its grounds rapidly before the acquisition. This argument is in essence an analogue of the Failing Company Doctrine. Respondent asserts in effect that since the acquired

[25] It is well settled that technical flaws in market share statistics are less important than the accuracy of the broad picture presented. *Brown Shoe Co.* v. *United States*, *supra*, at 341-342, n. 69. Also see *Luria Bros. & Co.* v. *F.T.C.*, 389 F.2d 847, 858 (3rd Cir. 1968, *cert. denied*, 393 U.S. 829; *The Papercraft Corp.*, 78 F.T.C. 1352, 1405-1406 (1974), *aff'd*, 472 F.2d 927 (7th Cir. 1973).

firm was no longer a viable competitor, its absorption by a competitor is incapable of producing substantial anticompetitive effects. However, the record evidence refutes this argument. First, F&D devised and successfully marketed special multi-peril policies ("SMP") in an attempt to counter the inroads of CMP into its fidelity business (F. 102). Furthermore, surety was not affected by either CMP or package-selling (Fs. 99, 139). Even with respect to fidelity, the record evidence shows that F&D was able to participate in this marketing device through its agents and offered discounts as an inducement (Culbertson, Tr. 1818). Most importantly, the record clearly shows that F&D was able to maintain its leading market position as well as its enviable record of overall growth, profitability and low loss ratios during the period before and after the acquisition in question (Fs. 26-29). Suffice it to say that this merger involves neither small companies nor failing companies. See *Brown Shoe Co.* v. *United States*, *supra*, at 331. For the same reasons, respondent's related argument that F&D had to seek an affiliation with a full-line insurance firm, such as American General, in order fully to participate in the CMP, package- and account-selling and to compete more effectively with its full-line competitors likewise lacks merit.

In its defense, respondent next argues that the relevant markets are characterized by ease of entry, that in fact there have been numerous entrants in recent years, and that there are numerous potential entrants, including large property/liability and life/health insurance companies. Therefore, it argues, the absorption of only one fidelity and surety underwriter by another is not likely to have the proscribed anticompetitive effect (RRB, pp. 115-129; RPF V-43 - V-47). In my view, the record evidence demonstrates the contrary. First, F&D was a leading, independent, long established fidelity and surety underwriter. There is nothing in the record which would indicate that an independent fidelity and surety firm of F&D's stature and ability is likely to enter the relevant markets to take [63] its place. Secondly, viewed against the size and profitability of the markets involved, both fidelity and surety are characterized by a remarkable paucity of new entries during the past three decades. Coupled with the evidence showing that only a few of the entrants have become a significant factor over a long period of time and that it took them so long to get established, the record conclusively refutes respondent's contentions in this regard (Fs. 147-148).

Generally speaking, in a horizontal merger case involving elimination of substantial actual competition, as is the case here, it is not incumbent upon the government to establish the existence of high entry barriers as a part of its case. See *Ekco Products Co.*, 65 F.T.C. 1163, 1208 (1964),

aff'd, 347 F.2d 745 (7th Cir. 1965). In any event, in the instant case, in view of clear evidence showing that concentration in the relevant markets steadily increased despite new entries, new entrants cannot be counted upon to replace the actual competition eliminated by this merger, much less to bring about deconcentration in the markets. Therefore, respondent's ease of entry argument may be safely discounted. Indeed, there is convincing evidence in the record which indicates that fidelity and surety underwriters require long years of specialized training, established underwriter-agent or customer relationships are difficult to overcome, and that there are fairly strict licensing and financial requirements at the state and federal levels (Fs. 103-107). All of the above compels the conclusion that entry barriers into the relevant markets are substantial. Most importantly, the relevant markets have not shown a deconcentration trend. On the contrary, concentration substantially increased over the last 15 years.

Respondent's suggestion that the fidelity and surety industries remain competitive at present is not a valid defense. "[R]emaining vigor cannot immunize a merger if the trend in that industry is toward oligopoly." *Brown Shoe Co.* v. *United States*, *supra*, at 333. Respondent's argument that there are numerous potential entrants is likewise invalid. First, this case involves a horizontal acquisition and consequent elimination of actual competition. Secondly, the argument that the major property/liability and life/health insurance firms are potential entrants into the fidelity and surety markets must be rejected for **[64]** the same reasons discussed in the preceding paragraphs. Respondent's reliance on *Beatrice Foods Co.*, Trade Reg. Rep. [1970-1973 Trans. Binder] ¶ 20,121 ([81 F.T.C. 481] F.T.C. 1972), a potential competition case, is entirely misplaced.

Respondent's argument that its acquisition of F&D is beneficial to competition because it would enable F&D to compete more effectively with the larger full-line firms is likewise rejected. First, F&D was, at the time of its "friendly" takeover by American General, a vigorous, growing and profitable company and a leading factor in the relevant markets (Fs. 16, 27, 28). See pp. 56-57, *supra*. Secondly, respondent's argument in essence amounts to a business justification argument long discredited by the Supreme Court. *United States* v. *Philadelphia National Bank*, *supra*, at 370-371. Furthermore, should the Commission accept respondent's argument in this regard and approve this merger, it may be called upon to approve similar acquisitions of non-full-line firms by American General's competitors in the future, and the independent bond specialist firms will soon become extinct. Section 7 was designed to prevent such developments. See p. 54, *supra*.

A few words need be said about the concentration data in the record.

First, it is my view that the concentration analysis in this case does not require an examination of the period reaching as far back as the 1940's as respondent claims.[26] Secondly, respondent's exhibit purporting to reflect the concentration trend in the relevant markets (RX 214B-C), is confusing and possibly seriously misleading in that it is based on net premium figures, includes reinsurance firms, and does not consistently group operating companies under the same control or management (Fs. 129-136). As regards the interpretation of concentration data, the Administrative Law Judge is bound by the general economic theory of oligopoly espoused by the Supreme Court and economic literature relied on by the Court in its Section 7 decisions since *Brown Shoe*. See pp. 53-55, *supra*.[27]

[65] Finally, respondent's argument that the challenged merger was a defensive move on the part of F&D compelled by the attempted takeover by Security Corporation through a tender offer and that these circumstances exonerate this acquisition is rejected (RPF II-1 to II-33). Also, the record does not support respondent's argument that a successful takeover of F&D by Security Corporation would have brought about certain dismemberment of F&D and dissipation of its financial resources. Respondent's argument that but for this acquisition F&D would have faced a certain demise is not persuasive. In my view, this is another business justification argument. In any event, it is equally well settled that a benign intent of the merging firms does not save a merger having demonstrable anticompetitive effects. H.R. Rep. 1191 on H.R. 2734, 81st Cong., 1st Sess. 8 (1949); *Brown Shoe Co.* v. *United States*, *supra*, at 329, n. 49.

[66] As shown hereinabove, the challenged acquisition not only eliminated the substantial actual competition existing between F&D and American General, but also eliminated a long established, prosperous speciality firm as an independent business entity, and substantially

[26] See Bok, *Mergers and the Clayton Act*, *supra* n. 18, at 314.

[27] Also see chapter 4 entitled "The Concentration and Profits Issue," in Goldschmid, Mann & Weston, eds., *Industrial Concentration: The New Learning* 162-245 (1974). I share Dean Neal's view that the work of revisionists like Yale Brozen and others have failed to refute the basic tenets of the oligopoly theory and that such studies as the Weiss and Scherer papers contained in *Industrial Concentration: The New Learning*, *supra*, have reenforced them. See *id.* at 377, 408-409. Also see Bain, *Industrial Organization* 448 (2d ed. 1968); Scherer, *Industrial Market Structure and Economic Performance* 132-157, 183-186, 231-232 (1970); Collins and Preston, *Price-Cost Margins and Industrial Structure*, 51 Rev. Econ. & Stat. 271 (1969); Brodley, *Oligopoly Power Under the Sherman and Clayton Acts - From Economic Theory to Legal Policy*, *supra* n. 20, at 297-298, 338-342.

And, there is no reason to think that concentration is less inimical to the free play of competition in fidelity and surety than in other service industries. *Cf.*, *United States* v. *Philadelphia National Bank*, *supra*, at 368-369.

Dr. Backman's contention that the fact that the composition and ranking of the four top firms in the relevant markets were not identical for every year establishes the existence of vigorous competition is not persuasive. Plainly, if a small number of firms dominate the market over time, accounting for an increasing share of the market, as is the case here, that fact is hardly consistent with vigorous competition. Also, the vigor of remaining competition is not a valid defense of an acquisition which eliminates a substantial competitive factor.

increased the concentration in the relevant markets. It is thus doubly objectionable, from both economic and social points of view.[28] In view of the clear congressional mandate to arrest anticompetitive tendencies in their incipiency and the controlling principles enunciated by the Supreme Court in its Section 7 decisions discussed hereinabove, the challenged acquisition cannot be allowed to stand.[29]

Respondent's reliance on *United States* v. *General Dynamics Corp., supra,* is misplaced (RB, pp. 56-93). In essence, respondent argues (1) that the complaint counsel presented a "bare-bone" statistical case herein, and (2) that further examination of the particular markets sanctioned by the Court in *General Dynamics* will show that the challenged acquisition in the instant case lacks the proscribed effect. Neither of the contentions is supported by the record. A cursory examination of the record will conclusively refute the first contention. *General Dynamics* surely does not require an unbounded economic inquiry beyond what is contained in this record. In any event, one of the central congressional objectives in adopting **[67]** the 1950 amendment to Section 7 was to reject the unwieldy "rule of reason" approach in Section 7 enforcement. See *Brown Shoe Co.* v. *United States, supra,* at 317-319. It is the Administrative Law Judge's opinion that the early misgivings over a too-broad economic investigation in Section 7 cases expressed by the Court and commentators have been reinforced by experience. This is especially true in a case involving, as here, a horizontal acquisition in markets trending toward higher concentration.[30] As for the second argument, the record does not show, as it clearly did in *General Dynamics,* that the market share and concentration statistics based on past performance are an entirely unreliable basis on which to ground a prediction as to what the probable effect of the merger may be. The ultimate rationale of the Court's majority in *General Dynamics* in not disturbing the trial court's conclusion approving that merger was that new realities of competition in the coal industry rendered the acquired firm an ineffective competitor for the foreseeable future and that, therefore, its disappearance as an indepen-

[28] *Brown Shoe Co.* v. *United States, supra,* at 315-316, 333, 344; *United States* v. *Philadelphia National Bank, supra,* at 362, 370-371; *United States* v. *Alcoa, supra,* at 280-281; *United States* v. *Von's Grocery Co., supra,* at 274, 278; *United States* v. *Pabst Brewing Co., supra,* at 552; Bok, *Mergers and the Clayton Act, supra,* at 247-248, 305-306; Brodley, *Oligopoly Power Under the Sherman and Clayton Acts - From Economic Theory to Legal Policy, supra* n. 20, at 341.

[29] It should be noted that the Court struck down horizontal acquisitions involving market shares smaller than those involved in this case. *E.g., United States* v. *Alcoa, supra; United States* v. *Von's Grocery Co., supra; United States* v. *Pabst Brewing Co., supra.* See also S. Rep. No. 1775, 81st Cong., 2d Sess. 6 (1950); *Brown Shoe Co.* v. *United States, supra,* at 322-323, 346; *United States* v. *Philadelphia National Bank, supra,* at 367; Bok, *Mergers and the Clayton Act, supra* n. 18, at 247-248, 305-306.

[30] *United States* v. *Philadelphia National Bank, supra,* at 362; *Von's Grocery Co.* v. *United States, supra; Pabst Brewing Co.* v. *United States, supra; Stanley Works* v. *F.T.C.,* 469 F.2d 498 (2d Cir. 1972), *cert. denied,* 412 U.S. 928 (1973); Bok, *Mergers and the Clayton Act, supra* n. 18, at 273, 295-296; Turner, *Conglomerate Mergers and Section 7 of the Clayton Act,* 78 Harv. L. Rev. 1313, 1318-1319, 1920-1921 (1965); Brodley, *Oligopoly Power Under the Sherman and Clayton Acts - From Economic Theory to Legal Policy, supra* n. 20, at 346-347.

dent firm did not matter. In the instant case, there are no new competitive realities which may have rendered F&D an ineffective competitor whose disappearance from the markets would hardly matter. On the contrary, despite its lack of full-line, F&D remained a leading, prosperous, highly profitable and vital competitor both before and after the acquisition. And, there is nothing in this record to cast any doubt upon F&D's continued success and viability in the future (Fs. 26-29). Nor is there any indication that the market share statistics and concentration analysis give an unreliable account of the acquisition's probable effects on competition in the relevant markets. In these circumstances, the challenged [68] acquisition cannot be approved without doing grave violence to the clear congressional mandate embodied in Section 7. See p. 60, *supra*.

E. Order

It is now axiomatic that the normal remedy in Section 7 cases is the divestiture of what was acquired unlawfully. Indeed, divestiture is the remedy specified by Section 11(b) of the Clayton Act. And complete divestiture is "peculiarly appropriate" in cases of stock acquisitions which violate Section 7. *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 330-331 (1961). It is also well established that the enforcement agency's panoply of remedial sanctions includes the power to bar unauthorized future acquisitions as well as other ancillary measures reasonably calculated to restore competition in the relevant market. *Ekco Products Co.*, *supra*, 65 F.T.C., at 1212-1217, 1222-1223, 1227-1228; *F.T.C.* v. *Dean Foods Co.*, 384 U.S. 597, 607, n. 5, 609, n. 9 (1966); *Luria Bros. & Co.* v. *F.T.C.*, 389 F.2d 847, 865 (3rd Cir. 1968); *Abex Corp.* v. *F.T.C.*, 420 F.2d 928 (6th Cir. 1970), *cert. denied*, 400 U.S. 865 (1970); *Ford Motor Co.* v. *United States*, 405 U.S. 562, 571-578 (1972); *OKC Corp.* v. *F.T.C.*, 455 F.2d 1159 (10th Cir. 1972); *Avnet, Inc.* v. *F.T.C.*, 511 F.2d 70 (7th Cir. 1975). And, there is no indication in this record that the required divestiture may bring about a loss of substantial efficiencies or important benefits to the consumer. Therefore, respondent will be required to divest the F&D stock and also will be prohibited from making any unauthorized acquisition in the fidelity and surety markets for a period of 10 years.

Respondent's argument that an undertaking to keep F&D as an independent operating entity would be an adequate remedy in the circumstances of this case, is rejected (RRB, pp. 146-149). First, there is no assurance that such an undertaking will effectively insulate F&D from the subtle and pervasive influence of its outright owner. To expect otherwise would be to ignore business realities and common experience and to indulge in wishful conjecture. Secondly, such an

undertaking would inevitably require continuing surveillance on the part of the Commission, embroiling it in interminable administrative chores, and may even lead to further [69] litigation. Such a course should clearly be avoided. Therefore, respondent's argument in this regard is totally unacceptable.

Complaint counsel's argument that respondent should be required to divest dividends received from F&D since the acquisition, including the $20 million upstream dividend, is likewise rejected. Complaint counsel do not claim that an infusion of additional funds or the return of received dividends is necessary in order to restore competition in the relevant markets or to ensure the continued viability of F&D after divestiture. Nor would the record support such a claim. Indeed, complaint counsel admit that F&D remains a prosperous and profitable company with ample financial resources. In the absence of any evidence of a wanton raid on F&D's corporate treasury by American General, there appears to be no need for such an extraordinary requirement in this case.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent American General Insurance Company ("American General").

2. On or about July 1, 1969, American General acquired substantially all of the shares of stock of Fidelity & Deposit Co. of Maryland ("F&D").

3. At all times relevant to this proceeding, American General and F&D were engaged in commerce within the meaning of the Clayton Act.

4. For the purposes of assessing the legality of the acquisition under Section 7 of the Clayton Act, the appropriate lines of commerce are the fidelity bond business and the surety bond business.

5. The appropriate section of the country within which to test the effect of the acquisition is the United States as a whole.

6. Prior to and at the time of the acquisition, American General and F&D were direct competitors in the fidelity and surety bond markets.

[70] 7. The acquisition eliminated the substantial competition between American General and F&D in the relevant markets to the detriment of competition.

8. The acquisition substantially increased the concentration in the relevant markets to the detriment of competition.

9. The effects of the acquisition of F&D by American General may substantially lessen competition in the fidelity and surety bond markets in the United States, in violation of Section 7 of the Clayton Act.

10. Divestiture of the acquired stock is both necessary and appropriate to remedy the probable anticompetitive effects of the unlawful acquisition.

ORDER

It is ordered, That:

I

Respondent, American General Insurance Company (hereinafter "American General"), a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within six months from the date this order becomes final and subject to prior approval of the Federal Trade Commission, divest absolutely and in good faith, all stock, assets, title, properties, interest, rights and privileges, of whatever nature, tangible and intangible, acquired by American General as a result of its acquisition of Fidelity and Deposit Company, together with all contract rights, premiums payable, buildings, improvements, equipment, [71] additions and other property of whatever description which has been added since that acquisition or hereafter shall be added to the property or assets of Fidelity and Deposit Company of Maryland ("Fidelity and Deposit"), so as to restore Fidelity and Deposit as a going concern and effective competitor in the fidelity and surety bond businesses.

II

By such divestiture none of the assets, properties, title, interest, rights or privileges described in Paragraph I of this order shall be sold or transferred, directly or indirectly, to any person who is at the time of divestiture an officer, director, employee or agent of or under the control or direction of American General or any of its subsidiary or affiliate corporations, or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common and/or preferred stock of American General.

III

No method, plan or agreement of divestiture to comply with this order shall be adopted or implemented by American General save upon such terms and conditions as first shall be approved by the Federal Trade Commission. [72]

IV

Pending divestiture, the assets and business acquired from Fidelity and Deposit shall be maintained and operated as a separate corporation with separate books of account, separate management, separate assets, and separate personnel.

V

Pending divestiture, no substantial property or other assets of the separate corporation referred to in Paragraph IV herein shall be sold, leased, otherwise disposed of or encumbered, other than in the normal course of business, without the consent of the Federal Trade Commission, and American General shall not commingle any assets owned or controlled by such separate corporation with any assets owned or controlled by American General.

VI

For the period of three years from the date on which this order becomes final, no individual employed by Fidelity and Deposit or the separate corporation referred to in Paragraph IV herein shall be employed by American General.

VII

Pending divestiture, the underwriting departments and selling and management personnel of the separate corporation [73] referred to in Paragraph IV herein and American General shall be conducted independently of each other.

VIII

Pending divestiture, American General shall maintain the separate corporation referred to in Paragraph IV herein as an independent entity and take no steps to impair such corporation's economic and financial position.

IX

American General shall forthwith cease any and all representation on the board of directors of Fidelity and Deposit and cease and desist from taking any steps to nominate, seat, or admit any representative of Fidelity and Deposit to the board of directors of American General.

X

Fidelity and Deposit shall forthwith cease any and all representation on the board of directors of American General and cease and desist from taking any steps to nominate, seat, or admit any representative of American General to the board of directors of Fidelity and Deposit.

XI

American General shall forthwith cease and desist from acquiring, directly or indirectly, for a period of ten (10) years from the date on which this order becomes final, without the prior approval of the Federal Trade [74] Commission, the share capital, assets or interest of any corporation engaged in fidelity and/or surety underwriting in the United States.

The provisions of this paragraph shall include any arrangement pursuant to which American General acquires the market share, in whole or in part, of any concern, corporate or noncorporate, which is engaged in fidelity and/or surety underwriting in the United States, (a) through such concern's discontinuing the underwriting of such product lines or (b) by reason of such concern's discontinuing the underwriting of such product lines and thereafter transferring to American General customer and account lists or in any other way making available to American General access to customers or customer accounts.

XII

Within thirty (30) days from the effective date of this order and every sixty (60) days thereafter until it has fully complied with Paragraph I of this order, American General shall submit a verified report in writing to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying or has complied therewith. All such reports shall include, in addition to such other information and documentation as may hereafter be requested, (a) a specification [75] of the steps taken by American General to make public its desire to divest Fidelity and Deposit, (b) a list of all persons or organizations to whom notice of divestiture has been given, (c) a summary of all discussions and negotiations together with the identity and address of all interested persons or organizations, and (d) copies of all reports, internal memoranda, offers, counteroffers, communications and correspondence concerning said divestiture.

XIII

American General shall notify the Commission of any proposed

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change at least 30 days prior to the proposed change in the corporate respondent, American General, such as dissolution, assignment or sale resulting in the emergence of a successor corporation(s), the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

Opinion of the Commission

June 28, 1977

By Collier, *Commissioner:*

[1] The complaint in this case charged American General Insurance Company ("American General") with violating Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) by acquiring Fidelity & Deposit Company of Maryland ("F&D") in 1969. More specifically, it alleged that the acquisition's effect may be substantially to lessen competition or to tend to create a monopoly in the business of underwriting fidelity and surety bonds in the United States and other markets.

A surety bond is an agreement by which one party (the surety) undertakes to guarantee the performance of an obligation by a second party (the principal) to a third party (the obligee). If the principal fails to perform, the surety must either discharge the obligation or indemnify the obligee. The most common type of surety bond covers construction contracts, and guarantees performance according to [2] the terms of the contract. Other kinds of surety bonds include license and permit bonds, fiduciary bonds, and judicial bonds (ID f. 32-33).[1]

A fidelity bond represents an undertaking by the bond writer to indemnify an employer against losses suffered through the dishonesty of bonded employees (ID f. 48).

American General is an all-lines diversified insurance company, based in Houston, Texas, with combined income of $527 million and admitted assets of $1.5 billion in 1968, the year before its acquisition of F&D. Its fidelity and surety business was modest until 1964, when it acquired Maryland Casualty Company ("Maryland Casualty"), a

[1] The following abbreviations will be used in this opinion:

ID f.	— Initial Decision finding no.
ID p.	— Initial Decision page no.
Tr.	— Transcript page no.
CX	— Complaint counsel's exhibit no.
RX	— Respondent exhibit no.
RAB	— Respondent's appeal brief
CAB	— Complaint counsel's appeal brief
R. Ans.	— Respondent's answering brief
C. Ans.	— Complaint counsel's answering brief
RRB	— Respondent's reply brief
CRB	— Complaint counsel's reply brief
RPF	— Respondent's proposed finding no.
CPF	— Complaint counsel's proposed finding no.

multiple lines company that was a significant factor in both the fidelity and surety fields (ID f. 1, 2, 5, 10). Thus, American General became a significant competitor in both the fidelity and surety markets, ranking sixth nationally in surety in 1968 with over $15 million in direct premiums, and twelfth the same year in fidelity with about $4.5 million in direct premiums (ID f. 113).

Unlike the more diversified American General, F&D had grown and prospered primarily as a bonding specialist since its formation in 1890. Eighty-eight percent of its premiums in 1968 were derived from the sale of surety and fidelity bonds (ID f. 12, 14). In 1968, F&D was the second ranked surety underwriter in the U.S. with about $27.5 million in direct premiums, and held third place in fidelity, with about $10.4 million in direct premiums (ID f. 113).

[3] In July, 1969, assertedly fearful that a tender offer by the Security Corporation for F&D's stock might succeed and lead to the company's demise, F&D's management instead arranged for the sale of virtually all its stock to American General in exchange for American General stock valued at about $107.5 million (ID pp. 2, 65).

The Commission's complaint was issued on June 17, 1971. The following year, the hearing examiner dismissed the complaint on the theory that the Commission lacked jurisdiction because of the McCarran-Ferguson Act (15 U.S.C. 1012(b)). The Commission reversed and remanded the case for trial. *American General Insurance Co.*, 81 F.T.C. 1052 (1972). Following an unsuccessful attempt by the respondent to enjoin the proceeding,[2] a hearing on the merits culminated in a finding on August 9, 1975, by Administrative Law Judge ("ALJ") Montgomery K. Hyun that the acquisition violated Section 7. He entered an order to divest F&D.

The respondent (and F&D, as an intervenor) appealed both the finding of liability and the terms of the divestiture order, while complaint counsel appealed the ALJ's refusal to order divestiture of dividends that were paid to American General by F&D. The appeal was argued on January 14, 1976; the Commission ordered reargument, which was heard on July 21, 1976.

Preliminarily, we reaffirm our earlier holding that the McCarran-Ferguson Act does not exempt this acquisition from Section 7 or remove it from the Commission's jurisdiction. Subsequent interpretations of the McCarran-Ferguson exemption by the courts have strengthened our conviction in the correctness of that conclusion.

For example, in *American Family Life Assurance Co. of Columbus* v. *Planned Marketing Associates, Inc.*, 389 F. Supp. 1141 (E.D. Va. 1974), the court denied motions to dismiss a Sherman and Clayton Act

[2] *American General Insurance Co.* v. *FTC*, 359 F. Supp. 887 (S.D. Tex. 1973), *aff'd*, 496 F.2d 197 (5th Cir. 1974).

complaint filed by one insurer against another, alleging a variety of practices aimed at diverting the plaintiff's business to the defendant. The court said that the phrase "business of insurance" as construed in *SEC* v. *National Securities, Inc.*, 383 U.S. 453 (1969) "compels this Court to conclude that a complaint based upon the Sherman Act and the Clayton Act involving interactions between two insurance companies, as distinguished [4] from transactions between an insurance company and its policy holders, is not barred from federal jurisdiction by the McCarran-Ferguson Act." 389 F. Supp. at 1146. Other courts have reached the same conclusion in antitrust litigation between an insurance company and its agent[3] and between an insurance company and a marketing agent.[4]

I. DATA SOURCES

Before considering the effect of this acquisition on competition in the relevant markets, we must resolve several objections raised by the respondent to the data relied on in the initial decision.

The respondent's first objection is to the ALJ's use of direct premiums rather than net premiums to measure market share and concentration in the fidelity and surety markets. The total premiums paid to a bond company are known in the industry as direct premiums. The bond company may, however, cede a portion of the coverage on a bond to a reinsurance company, which accepts part of the risk in return for a portion of the premium. Net premiums represent the amount of premiums the primary writer retains after having ceded some of the direct premiums to the reinsurer, (ID f. 130-131) plus whatever reinsurance the company itself accepts.

The respondent argues that net premiums are a better measure of a bonding company's "competitive strength" than direct premiums because only net premiums accurately reflect the company's capacity to write bonds. A bond writer's capacity to accept a single bond of a given size is limited to a percentage of its capital and surplus (ID f. 132). Because F&D is assertedly capacity-short in comparison to [5] its competitors, the respondent contends that F&D must reinsure more heavily than they do, essentially by purchasing capacity from other firms (RAB 13).

We believe the ALJ was correct in adopting direct premiums as an appropriate measure of competitive effects. That is not to say that net

[3] *Allied Financial Services, Inc.* v. *Foremost Insurance Co.*, 418 F. Supp. 157, 161 (D. Nebr. 1976) ("* * * [T]he Court declines to extend the McCarran Act exemption to a dispute which should have little or no effect on the interests of policyholders and which primarily involves an agency agreement, not 'the contract of insurance.' ")

[4] *DeVoto* v. *Pacific Fidelity Life Insurance Co.*, 354 F. Supp. 874, 877 (N.D. Calif. 1973), *rev'd on other grounds*, 516 F.2d 1 (9th Cir.), *cert. denied*, 423 U.S. 894 (1975). *Compare Schwartz* v. *Commonwealth Land Title Insurance Co.*, 374 F. Supp. 564, 572-3 (E.D. Pa. 1974); *Dexter* v. *Equitable Life Assurance Society*, 527 F.2d 233 (2d Cir. 1975).

premiums lack significance; the ALJ found that they are the measure generally relied on for internal reports to a bond company's management (ID f. 133). But the ALJ found, and the respondent concedes, that direct premiums are the best measure of market penetration by a bond company (ID f. 134; RPF IV-36). They are the closest analogue to sales in the bonding business; F&D, in its 1966 annual report, described direct fidelity premiums as "the real measure of production on [sic] this business." (CX 13, p. 4). Direct premiums represent the state of the market at the agency level, where bonds are purchased. Direct premiums measure a bonding company's success in convincing customers to buy its product. There is nothing in the record to indicate that agents care whether a primary writer may reinsure a bond to a greater or lesser degree.

Moreover, reinsurance is, of course, only one means of accumulating capacity to write additional insurance. We do not understand respondent to argue that F&D was foreclosed from conventional sources of capital. Nor can respondent gain comfort from *United States* v. *General Dynamics Corp.*, 415 U.S. 486 (1974). In that case the Court found and relied on the facts not only that the firm's reserves were committed but that coal is a finite and exhaustible natural resource, 415 U.S. at 509.

The record also reflects that enhancement of capacity is not the only reason that bonding firms seek reinsurance arrangements.[5] They do so to spread their own risks, as F&D's president testified: [6]

> If I had unlimited resources on business *that I would consider to meet every single underwriting requirement*, I would keep every dime of it. In other words, *I reinsure on a surety risk or on a fidelity risk according to the degree of risk that I believe the company is assuming.* Furthermore, there are limitations on how much I can keep with respect to my capital and surplus. (Emphasis added.) (Tr. 797)

Indeed, F&D's ability to reinsure may depend upon its successful record of selecting good risks and reducing those it does select. In other words, F&D's competitive strength in the industry is partially reflected by the extent of its reinsurance rather than diminished by it.

American General's emphasis on F&D's capacity limitations rings all the more hollowly in light of its handling of F&D's capital and surplus since the acquisition.

In 1973, F&D paid American General a special "upstream" dividend of $20 million, which reduced F&D's capital and surplus by more than 20 percent at the time. American General evidently regarded F&D as having, if anything, excess capacity (Tr. 1532).

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[5] The chief examiner of the New York State Insurance Department's fire and multi-line bureau, whose responsibilities included fidelity and surety, said of direct premiums:

> Well, we feel it is a better barometer of a company's business transactions. When you get into net you are getting into internal management decisions as far as reinsurance which would not really reflect the company's direct business transactions (Tr. 1096).

The respondent's second major objection to the market share and concentration data relied on in the initial decision relates to the treatment of commercial multi-peril policies, known as "CMP." CMP, offered by many insurance companies, combines a number of coverages into one package policy. CMP often includes a fidelity component, which the ALJ found is functionally equivalent to a fidelity bond purchased separately. The data problem arises because many insurance companies do not report the fidelity component of CMP independently, so market share figures for straight fidelity omit some percentage of the market accounted for by the fidelity slice of CMP. Even though F&D has a package policy of its own (denominated special multi-peril or "SMP"), it does report the fidelity portion of the policy separately, so that its fidelity share of its own package is included in its market share figures.[6] Thus, any missing fidelity [7] share of CMP, if added to the total fidelity market, would serve to depress the market share achieved by the American General-F&D acquisition (ID f. 99-102, 137-141).[7] The CMP dispute is irrelevant to the surety market; surety bonds are not sold in packages including other coverages (ID f. 139).

The respondent argues that the unaccounted-for fidelity portion of CMP would have amounted to 13.6 percent of the straight fidelity total for 1969, the acquisition year, and significantly reduced F&D's market share. (For the post-acquisition year 1973, the respondent estimates the CMP/fidelity portion at 25.2 percent of straight fidelity.) Complaint counsel, on the other hand, derived estimates that the fidelity portion of CMP falls between 3.3 percent and 10.9 percent of the fidelity total. The ALJ accepted complaint counsel's estimates and dismissed the CMP figures as not materially affecting market data at the time of the acquisition. If the respondent's data were correct, F&D's market share would have been reduced by 1.1 percent in 1969 (7.6 to 6.5 percent), and by 1.3 percent in 1973 (6.3 percent to 5 percent). Even if these data were used the combination of American General and F&D still would have produced the number one ranked firm in the industry in 1969, and the fourth ranked firm in 1973 (ID f. 142, 143).

In a Section 7 case, of course, the governing principle is that "precision in detail is less important than the accuracy of the broad picture presented." *Brown Shoe Co.* v. *U.S.*, 370 U.S. 294, 341 at n. 69 (1962). Where the size of the product market is at issue, a "rough

[6] No consideration was given at trial, apparently, to the possibility that free-standing fidelity bonds and packages policies may be in different markets, or that free-standing fidelity coverage and fidelity coverage as part of a package policy may be distinct submarkets.

[7] Curiously, neither party has cited to any portion of the record that would tell us whether American General, either through Maryland Casualty or otherwise, sold fidelity coverage in a CMP policy, and if so, how that coverage was reported and how significant it might be in considering the combined market share achieved. American General was evidently the 17th ranked CMP writer nationally in 1969, with over $22 million in premiums (RX 296).

approximation" has been held to make out a prima facie case. *Avnet, Inc.* v. *FTC*, 511 F.2d 70, 77 at n. 19 (7th Cir. 1975).

[8] The estimates in the record of the fidelity portion of CMP premiums as a percentage of total CMP premiums are:[8]

Individual companies			
1. Continental	2.7%		(RAB 21)
		1.7-1.8%	"SMP" policy (Tr. 468)
		4.5%	"CBP" policy (Tr. 468)
2. F&D	1.65%-1.60%		(Tr. 1716-1718)
3. Fireman's Fund	1.5%		(Tr. 1606)
4. Hartford	1.5%		(RAB 21)
5. Safeco	.5%-.6%		(Tr. 1135)
Agencies			
1. James J. Riley Agency	.5%		(Tr. 1372-1373)
Industry sources			
1. Surety Association	.9%-1.5%		(Tr. 1229)
2. Insurance Services Office (ISO)	.8%		(CPF 151)

The 3.3-10.9 percent range for the size of CMP fidelity in relation to the straight fidelity market, accepted by the ALJ, was based in turn on a .5-1.8 percent range for fidelity within CMP. The latter range was taken from the above-listed figures. The respondent computed an average of 1.9 percent and a median of 2.1 percent based only on the figures for Fireman's Fund, Hartford, and the 2.7 percent overall figure for Continental. The respondent contends that none of the other figures (including F&D's own) is reliable.[9]

[9] What is striking, in an initial perusal of these numbers, is that the range adopted by the ALJ is wide enough to encompass *every* estimate in the record except for Continental's overall figure (as calculated by the respondent), and the 4.5 percent figure for the CBP ("comprehensive business") policy which, to all appearances, tugs the overall Continental number upward. Complaint counsel questioned Witness Reusch of Continental about the relationship between Continental's SMP and CBP policies, and the policies generically referred to as CMP:

> Q: Are these of the same type that is generally referred to as a CMP?
> A: The SMP is probably very similar to the generally referred to CMP.
> Q: Was the other one CPB?
> A: CBP.

[8] These percentages were then applied by the parties to total CMP writings to give a dollar figure for the fidelity component of CMP. That dollar figure was used to calculate a percentage for CMP fidelity as compared to straight fidelity.

[9] Complaint counsel had also computed an average, but the initial decision did not rely on it.

> Q: I am sorry. How does that compare with the general CMP policy?
>
> A: Well, it is a very specially designed form of coverage that is very broad and includes coverage that otherwise might be in a doubtful area between the two specific lines if those specific lines were written conventionally. CBP is a very sophisticated package policy. (Tr. 467)

The witness' testimony, taken as a whole, indicates that the CBP policy is atypical, and we believe the ALJ was correct in accepting an estimate for the Continental policy (SMP) specifically identified as being analagous to the package policy in use by the rest of the industry.[10] The respondent's insistence on inclusion of this policy is particularly incongruous in light of its refusal to accept the Safeco estimate, on the ground that the company was too small a **[10]** factor in the industry (20th in CMP) to be representative. Yet the respondent points to nothing in the record that suggests that Safeco's policies were in any way unusual in their composition, while there is unambiguous testimony that Continental's CMP writings included a policy that was quite unlike other CMP. On the face of these estimates, the ALJ's finding of the 1.8 percent figure as an upper limit is consistent with the weight of the evidence.

Data collected by industry associations confirmed the testimony of company executives on the .5-1.8 percent range for the fidelity component of CMP. Over the period 1963-1970, the Surety Association, the national trade association for fidelity and surety bond writers, queried its affiliates annually on the percentage of fidelity attributable to their CMP premiums, and their replies (computed as a weighted average that corrected for variations in company sales) ranged between .9 and 1.5 percent (Tr. 1229, 1467). Substantial numbers of companies (or groups) responded; 97 answered in 1969 (CX 151).

The respondent attacks the Surety Association sample as unreliable, but we cannot agree. The respondent makes much of the fact that some sellers of CMP were not affiliated with the Surety Association, and some affiliates failed to respond, allowing the Association (which put out the call for information in order to assess dues) to estimate their shares based on the factor computed for the companies that actually responded. But the missing companies do not taint the Surety Association figures insofar as they apply to the sizeable number of firms who *did* reply, and on whose answers the .9-1.5 percent range was based (Tr. 1466).[11] The respondent suggests that the absent companies would have had higher fidelity components in their CMP policies, but

[10] The respondent argues that Continental's CBP policy is "comparable" to other financial institution package policies offered by F&D and its competitors, because there is evidence that F&D had lost some accounts to the CBP policy and feared the loss of others (RAB, p. 21, n. 16). But the fact that CBP competes with other package policies tells us very little, if anything, about whether its makeup is typical of the bulk of other package policies. Mr. Ruesch's testimony suggests strongly that it is not.

[11] The respondent did establish that the Surety Association's figure for INA in 1969 was seriously understated, and

(Continued)

has produced no specific examples, with the exception of Continental, previously discussed. Because the reported figures were used to assess dues, the respondent contends, even the [11] companies who submitted data had an incentive to minimize their fidelity components. We cannot speculate, however, that the reporting firms falsified their submissions; the Association official responsible for collecting the data found the suggestion unimaginable, and some members were already paying maximum dues, anyway (Tr. 1464-65).

The Surety Association depended upon these data for dues. It would be unreasonable to think that the Association would stick with a dues assessment procedure containing a serious bias toward underreporting for eight years, since its own income was involved. Moreover, it is worth noting that two of the three companies whose CMP/fidelity estimates the respondent itself relied on, and who were at the high end of the range, did in fact report their figures in response to the Surety Association's call (Fireman's Fund and Hartford) (Tr. 1425).

Some additional support for the initial decision's estimate came from data collected by the Insurance Services Office, an industry statistical service. The ISO enlisted companies in a statistical reporting plan, which generated figures on the portion of CMP premiums the companies deemed attributable to fidelity coverage. For 1969, the year of the acquisition and the first year under the plan, the fidelity component of CMP was reported to be .8 percent (ID 61). Cross-examination revealed sizeable discrepancies between total CMP premiums reported under the ISO plan and total CMP premiums reported elsewhere, which were considerably larger (Tr. 3234-3247). Part but not all of the gap appears to be attributable to the fact that only new or renewal premiums were reported to ISO in 1969, the plan's start-up year (Tr. 3251-52, 3262-63). Because the discrepancies were never completely explained, we do not over-weigh the ISO figure for the fidelity slice of CMP. But the ISO report is generally consistent with, and tends to support, the estimates of company executives and the data given to the Surety Association.[12]

[12] In summary, the preponderance of the evidence supports the ALJ's estimates of the fidelity portion of CMP.

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that Hartford and INA did not separately report the fidelity portion of homeowners' multiple peril policies (Tr. 1427-1433). But the INA understatement only affected one year of the eight for which the figures were compiled, and even then to an unknown degree. Fidelity in homeowners' policies, we suppose, covers servants; there is no reason to think its omission is significant.

[12] In addition, the importance of the missing fidelity portion of CMP is tempered by the facts that not all CMP policies contain fidelity protection (Tr. 112, 354, 477), and that a few CMP writers report their CMP fidelity as straight fidelity (Tr. 1468).

II. PROBABLE EFFECT

There is no dispute here concerning the appropriate product and geographic markets within which the competitive effect of this acquisition should be measured. The geographic market is the Nation (ID f. 69); the product markets are fidelity bonds and surety bonds (ID f. 30).

Changes in Market Structure

We begin as is customary in these cases with a review of the changes that this merger worked on the structure of the relevant markets, keeping in mind the legislative purpose of Section 7 of the Clayton Act "to prevent a rising tide of economic concentration *** when the trend to a lessening of competition in a line of commerce was still in its incipiency," *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 317-318 (1962).

Measured by direct premiums, the acquisition combined F&D, the third ranking firm in the national fidelity market in 1968 with a 7.4 percent share, and the twelfth ranking firm, American General/Maryland, with a 3.3 percent share. The resulting firm ranked first in the fidelity market with a share of 10.3 percent in 1969 (ID f. 108-110, p. 58). In surety, F&D ranked second in 1968 with 8 percent of the market, and American General/Maryland ranked sixth with 4.4 percent. After the acquisition, the firms held first place in the surety market with 12.3 percent (ID f. 108-110, p. 58).

Concentration ratios in the fidelity and surety markets were as follows, before and after the acquisition:

	Fidelity		*Surety*	
	1968	*1969*	*1968*	*1969*
4-firm	31.3%	35.9%	30.6%	35.3%
8-firm	53.5%	60.5%	49.8%	51.7%
15-firm	75.5%		69.8%	

(Source: ID f. 113, p. 58)

[13] The Commission has regarded similarly structured markets as moderately concentrated.[13] American General properly contests the ALJ's characterization of the fidelity and surety markets as "approaching advanced oligopolies." (ID p. 60). But it concedes that, under two

[13] *Sterling Drug, Inc.*, 80 F.T.C. 477, 596 (1972) (4-firm asset ratio of 31 percent, 8-firm ratio of 48 percent, 20-firm ratio of 75 percent).

widely accepted typologies of market structure, the markets exhibit "low-moderate concentration"[14] and qualify as a "loose oligopoly."[15]

Even if the fidelity and surety markets were unconcentrated, the cases teach that a trend toward concentration of sufficient strength and duration would still render a combination between a pair of substantial competitors illegal under Section 7. "Although there is no single test, an important consideration * * * is whether there is a market trend that threatens to transform an unconcentrated market into a concentrated market or whether the merger significantly adds to or threatens to entrench existing concentration." *Sterling Drug Co., supra*, 80 F.T.C. at 598. A "loose oligopoly," while not in itself a critical level of concentration,[16] still can threaten competition if propelled strongly toward higher levels.

[14] Both the fidelity and surety markets exhibit trends toward concentration, although the trend is stronger in the former than in the latter. The ALJ correctly found a trend toward concentration in fidelity and surety (ID f. 145). In the 1962-1968 period, using direct premiums, the four- and eight-firm fidelity concentration ratios increased by 7.1 percent and 8.4 percent of the market, respectively. Taking the ten-year period prior to the acquisition (1959-1968), the four-firm ratio increased 5.3 percent and the eight-firm ratio, 5.7 percent. In surety, between 1962 and 1968, the four-firm ratio rose 5.4 percent and the eight-firm ratio increased 7.1 percent. In the decade preceding the acquisition, the four-firm ratio gained 5.0 percent and the eight-firm ratio, 6.4 percent.[17]

Nothing in the post-acquisition history of these markets negates these trends. In the fidelity market, concentration continued to climb until, in 1973, it had reached 11.3 percent above 1959 at the four-firm level, and 13.6 percent above 1959 at the eight-firm level. In surety, neither concentration ratio has changed significantly since the **[15]**

[14] Bain, Industrial Organization 143 (1959) (RAB at 25).

[15] Kaysen and Turner, Antitrust Policy: An Economic and Legal Analysis 72 (1959), *Id.* American General argues that the Commission itself has defined an industry with a 4-firm ratio of less than 40 percent as unconcentrated. Economic Report on Corporate Mergers 17 (1969). What that staff report said, however, was that an industry with a 4-firm ratio exceeding 40 percent is *concentrated*, not that anything below that level is unconcentrated. Concentration, obviously, is not an all-or-nothing proposition.

[16] *Warner-Lambert Co.*, 87 F.T.C. 812, 869 (1976).

[17] American General seeks to rely on Department of Justice merger guidelines, but it misstates them. The respondent quotes the guidelines correctly to the effect that a trend can be found where the market share of leading firms increases by approximately seven percent or more. Then paraphrasing, the respondent states that the change must occur "during the ten or so years prior to the merger." (RAB at 26). What the guidelines actually say is that the approximate seven percent or greater shift in market share must occur "over a period of time extending *from any base year 5-10 years prior to the merger* (excluding any year in which some abnormal fluctuation in market shares occurred) *up to the time of the merger.*" (Emphasis added.) 1 CCH Trade Reg. Rep. ¶4510. American General then proceeds to cite concentration ratios reaching back to 1923, which are irrelevant under the merger guidelines and in the context of this case, and were properly excluded by the ALJ. If we apply the guidelines correctly, we see that they were exceeded at both the four- and eight-firm level in fidelity between 1962 and 1968, and at the eight-firm level in surety over the same period.

acquisition, with the top four holding a little more of the market than in 1968, and the top eight a little less. Both ratios, however, still substantially exceed 1959 levels.[18]

The respondent also argues that the period during which concentration ratios should be examined ought to extend back to 1955, and points out that the level of concentration in both the fidelity and surety markets dipped slightly during the late 1950's. Even if this is so, the earlier period has less relevance to analysis of the acquisition than the later.[19] Here, even if we consider the 1955-1958 data, the concentration figures advanced by American General show a modest decline in concentration that was abruptly arrested around 1960, yielding to a steady increase in concentration that held sway through the succeeding decade and beyond. The fact that a trend toward deconcentration reversed itself hardly provides the comfort on which respondent urged us to rest.

In summary, American General's acquisition of F&D created the leading firm in both the fidelity and surety markets through the combination of two substantial actual competitors. The two markets were moderately concentrated, and the acquisition substantially increased that concentration in both instances. Both markets were characterized by a trend toward concentration in the eight years immediately prior to the acquisition.

These measures of the changes in market structure provide persuasive proof that this horizontal acquisition had the probable effect of substantially lessening competition. The acquisition and its effect on the appropriate markets are well within the range of similar factual situations in other Section 7 cases that have led to findings of illegality, as the following table illustrates: **[16]**

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[18] If we consider trends through 1973, as American General urges us to, we see that the fidelity market had attained the degree of concentration that the Commission found in Beatrice Foods to be "concentrated." *Beatrice Foods Co.*, 86 F.T.C. 1, 68-69 (1975) (four-firm ratio of 41.3 percent, eight-firm ratio of 62.5 percent).

[19] In *Sterling Drug*, the Commission examined concentration trends for 1958-66, the eight years preceeding the acquisition. In *Warner-Lambert*, where an acquisition occurred in the same markets in 1970, four years later, the Commission noted that a later base year than that chosen in *Sterling* should be used in order to focus attention on the "*recent* trend". *Warner-Lambert*, *supra*, at 872, n. 16 (emphasis in original).

	Rank			Market Share (%)			Concentration (4-firm %)		Concentration (8-firm %)		Concentration Trends (%)
	Acquirer	Acquiree	Combined	Acquirer	Acquiree	Combined	Before	After	Before	After	
Brown Shoe Co. v. U.S., 370 U.S. 294 (1962)				.3-34.4	.6-36.6	5.0-57.7					
U.S. v. Von's Grocery Co., 384 U.S. 270 (1966)	3	6	2	4.7	4.2	7.5	24.4	28.8	40.9	44.0	1948 1958 4-firm 25.9 24.4 8-firm 33.7 40.9
U.S. v. Pabst Brewing Co., 384 U.S. 546 (1966) (U.S. market) (3-state market)	10 7	18 6	5	5.48	5.84	4.49					1957 1961 10-firm (U.S.) 45.06 52.06 8-firm (3-state) 58.93 67.65
Beatrice Foods Co., 86 F.T.C. 1 (1975), aff'd, 540 F.2d 303 (7th Cir. 1976) (brush-and-roller market) (roller market)	3 8	13 5	3	7.6 3.7	2.3 7.0	10.7	41.3 58.1	43.6 61.6	62.5 78.6	64.8 80.8	(brush-and-roller) 1967 1969 4-firm 36.6 41.3 8-firm 52.8 62.5
Liggett & Myers, Inc., 87 F.T.C. 1014 (1976) (all dog food market)	4	6	2	10.99	4.41	15.76	54.44	59.01	71.96	76.54	
Warner-Lambert Co., 87 F.T.C. 812 (1976) (cough remedies market)				4.4	4.2	8.7	45	up 3%	65	up 3%	
American General (Source: 10 F. 108-112, 145) (fidelity market) (surety market)	12 6	3 1	1	3.3 4.4	7.4 8.0	10.7 12.4	21.3 30.6	34.6 35.0	53.5 49.8	56.8 53.6	(direct premiums) 1959 1968 1973 4-firm: fidelity 26.0 31.3 37.3 surety 25.6 30.6 31.8 8-firm: fidelity 47.8 53.5 61.4 surety 43.4 49.8 48.9

[17] American General argues that the statistical portrait of this acquisition and its probable effects is erroneous or misleading with respect to the elimination of actual competition, increases in concentration, and contribution to a trend to concentration. We will consider these arguments in turn.

Elimination of Actual Competition

The ALJ relied in part for his conclusion that the acquisition would lessen competition on the elimination of competition between American General and F&D. The respondent argues that mere elimination of competition between the acquiring and acquired firms cannot invalidate a horizontal merger. While it is obvious that horizontal mergers are not illegal *per se*, it is equally obvious that the loss of competition between the parties to the acquisition is a factor to be considered in assessing its legality under Section 7.[20]

American General maintains that little effective competition has ever existed between American General and F&D because few agents include both companies in the "stable" of bond writers to which they turn in the first instance to meet their clients' needs, and because the two firms do not compete on the basis of price, agents' compensation, or the amount of discretionary authority conferred on agents (RAB 36-39). It is a sufficient answer to the first of these arguments merely to observe that the firms operate in a concededly national market, and sell the same products to the same classes of customers (I.D. f. 59, 62; p. 56). In the face of consensus on these points and the ALJ's findings it is not necessary to prove that parties to a horizontal merger sell identical services on identical terms to identical customers.[21]

[18] Moreover, there is ample additional evidence in the record of actual competition (Tr. 1281; RX 161, p. 2). An official of a large, multistate agency testified that both American General and F&D are in fact included in his firm's "stable." (Tr. 1394). Agents resort to underwriters outside of their stable if their accustomed bond writers cannot handle the job (Tr. 784). Agents representing different bond writers compete with each other for accounts (Tr. 2528-29), and the bond writers themselves compete for inclusion within an agent's stable. The president of F&D testified that agents are widely courted by bond companies over the "long run." (Tr. 783). Both F&D and Maryland Casualty place advertisements soliciting business directly, without an agent's mediation (Tr. 2523).

As for the second argument—that F&D and American General

[20] *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 280-281 (1964).

[21] *RSR Corp.*, F.T.C. Dkt. 8959 (Dec. 2, 1976) [88 F.T.C. 800], *appeal pending*, No. 77-1413 (9th Cir.), 3 CCH Trade Reg. Rep. ¶21,252, at p. 21,154.

compete only in, the "minor" aspects of service and underwriting attitudes—we cannot accept the characterization of service competition as minor even if we were to accept that competition between the two firms is so narrowly confined. F&D's president testified that service is his company's strong suit in defending its accounts (Tr. 741); at least to one agent, service is considerably more important than price (Tr. 1401). In any case, the ALJ found that price competition in fact occurs (ID f. 80). The respondent does not contest this finding, and indeed, F&D's president testified that his firm's rates do vary from those suggested by the Surety Association of America (Tr. 1711-13), casting doubt on respondent's argument that mutual adherence to the suggested rate structure vitiates price competition.

American General relies on *United States* v. *Trans Texas Bancorporation, Inc.*, 1972 CCH Trade Cases ¶74, 257 (W.D. Tex. 1972), *aff'd without opinion*, 412 U.S. 946 (1973), and *United States* v. *Citizens and Southern National Bank*, 422 U.S. 86 (1975), for the proposition that mergers between companies not in significant competition with each other do not violate Section 7. But in both of the cited cases, the acquired banks were effectively appendages of their acquirers, created as virtual puppets to escape state banking law restrictions on branching and entry. The cases are obviously far removed from the combination of two firms who were completely independent prior to the challenged acquisition.

American General additionally argues that its competition with F&D will not be affected, because F&D has been and always will be operated with complete autonomy. American **[19]** General has offered to formalize its assurances of the continued independence of F&D in a consent order.[22] The Commission has rejected just such arguments, pointing out that the competitive independence of the acquired company is the sort of post-acquisition evidence that is completely dependent on the grace of the acquirer.[23] The Commission has given the argument "no weight":

> We have no guarantee Perk will continue to retain whatever freedom a "profit center" has, nor do we have any way of knowing what the effect of being held separate as a "profit center" is. Does Perk have as much access to capital from its parent corporation, does it have as much positive pressure on it to develop new products and defend its old products, does it have as much an infusion of aggressive

[22] In a motion to reopen the record, discussed *infra*, the respondent represents that it has terminated Maryland Casualty's bond writing operations. If true, this would make the tendered consent order academic, to say the least.

[23] *Liggett & Myers Inc.*, 87 F.T.C. 1074, 1173 (1976), *appeal pending*, No. 76-1771 (4th Cir.), citing *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 504-505 (1974).

managerial talent as it might have were it still in the hands of its former owners or of an acquirer with whom it did not compete?[24]

These objections are not cured by a consent agreement that would institutionalize a hold-separate arrangement. The ALJ rejected the proffered agreement, correctly noting that no order can insulate the acquired company from the subtle anticompetitive incentives that flow from common ownership, and that such an agreement would involve the Commission in the burdensome policing of the company's daily operations. Hold-separate orders are obviously stopgap measures, intended only to preserve the potential for ultimate relief. Finally, a hold-separate order is simply illogical. If there is a violation, divestiture is obviously and statutorily the remedy of choice, and half-measures cannot match it for returning the market as closely as possible to its preacquisition state. If there is no violation, a hold-separate order may promote inefficiency; the acquiring firm *should* be able to exercise its business judgment in integrating its own operations and those of the acquiree where competition would not be substantially lessened.

[20] In short, the ALJ's conclusion that the acquisition extinguished substantial competition between American General and F&D is fully supported by the evidence.

Increase in Concentration

American General argues that the increase in concentration resulting from its acquisition of F&D must be discounted in view of the post-acquisition decline in the combined market share of the two companies. But like the post-merger "independence" of the acquired firm, discussed *supra*, a post-acquisition fall in market share is of little probative value. While post-acquisition evidence is admissible in exceptional circumstances, it is well established that a finding of a violation will not be excused by proof of facts that were within the power of the accused to manufacture.[25] In *United States* v. *General Dynamics Corp.*, 415 U.S. 485 (1974), on which the respondent relies, the Supreme Court took care to emphasize the reasons why post-acquisition evidence rarely has value, with the clear implication that those reasons

[24] *Id.*

[25] *United Brands Co.*, 83 F.T.C. 1614, 1703 (1974).

would continue to control most Section 7-cases 415 U.S. at 404-405. Both before[26] and after[27] *General Dynamics*, the Commission has given little weight to post-acquisition declines in market share, and we see no reason why such evidence in this case should be regarded any differently.

[21] The respondent also points to the testimony of competitors and agents that the acquisition has not lessened competition. We likewise accord little weight to such evidence, especially where the operations of the two companies—at least for the moment—have not been completely integrated. As the Commission noted in *Liggett & Myers*, *supra*, competitors' testimony must be evaluated in light of their potentially hospitable attitude toward increased concentration, and their interest in making similar acquisitions of their own 87 F.T.C. 1173-1174. The testimony of customers, while sometimes of use, is too easily influenced by the natural aversion to alienation of their suppliers.

Trend Toward Concentration

The respondent notes that the ALJ failed to find that the horizontal mergers which took place in the fidelity and surety markets prior to the instant acquisition contributed to an increase in concentration, arguing: "[E]ven those increases in concentration that did occur during the 1960's were not the result of mergers (other than this one) and are therefore irrelevant to the decision of this case." (RRB 22).

Quite to the contrary, a trend to concentration is not to be disregarded simply because it might not be attributable to mergers. Complaint counsel did not have to prove that the trend owed its existence primarily or even partially to mergers. American General has advanced precisely the argument the Supreme Court dismissed in *Pabst:*

> We have not overlooked Pabst's contention that we should not consider the steady trend toward concentration in the beer industry because the Government has not shown that the trend is due to mergers. There is no duty on the Government to make such proof. It would seem fantastic to assume that part of the concentration in the beer industry has not been due to mergers but even if the Government made no such proof, it would not aid Pabst. * * * [I]t is not for the courts to review the policy decision of Congress that mergers which may substantially lessen competition are forbidden, which in effect the courts would be doing should they now require proof of the congressional premise that mergers are a major cause of concentration. [22]

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[26] *The Seeburg Corp.*, 75 F.T.C. 561, 665 (1969), *aff'd*, 425 F.2d 124 (6th Cir.), *cert. denied*, 400 U.S. 865 (1970). The respondent attempts to distinguish *Seeburg* because, assertedly unlike the situation here, the markets in that case continued to increase in concentration after the acquisition. Not only is the respondent incorrect about the post-acquisition trend in fidelity and surety, but it omits to mention that the Commission in *Seeburg* said in the next breath that even a decline in concentration could not compensate for the loss of actual competition 75 F.T.C. 665.

[27] *Liggett & Myers Inc.*, 87 F.T.C. 1074, 1180-1181 (1976), *appeal pending*, No. 76-1771 (4th Cir.).

> We hold that a trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be. [384 U.S. at 552-553]

Neither have respondents demonstrated that the trend toward concentration has been the result of increasing efficiencies of large scale production or technological change.

American General also argues that because seven of the top eight fidelity bond writers in 1973 had straight fidelity market shares that were higher than their CMP shares, due consideration for the fidelity portion of CMP would cancel out the increases in concentration shown in the record. But as we have already found, the fidelity portion of CMP is too small to affect the analysis of this acquisition. Besides, the respondent has offered figures for a post-acquisition year, using net rather than direct premiums, and acknowledging that the argument depends on a double assumption: that all the top eight companies have roughly equal fidelity components of their CMP policies, and that fidelity within CMP increases in direct proportion to total CMP premiums. We agree with complaint counsel that this line of argument is far too speculative to cast doubt on the clear trends toward concentration that are quantified on the record.

III. QUALITATIVE ANALYSIS

American General argues that other factors at work in these two markets neutralize whatever probable anticompetitive effect can be predicted from the statistical evidence.[28] We have considered these arguments with care.

A. Entry Barriers

There are significant (though not insuperable) obstacles to entry into the surety and fidelity markets. American General contends, however, that they pose no substantial **[23]** deterrent to the large property-liability insurance companies which are assertedly the most likely entrants, and that ease of entry must be balanced against the immediate effect of the acquisition.

The key to success in the contract surety field is skilled underwriters to evaluate the complex risks attending the writing of a surety bond (ID f. 104, Tr. 223, 1127). Witness after witness testified that such people are hard to find and hard to train, even for the larger property-liability firms with ambitions to enter the surety business (Tr. 106, 206,

[28] "Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history, and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 322, n. 38 (1962).

224, 883, 921). An entrant can hire a few experienced underwriters and use them to train others, but the training process is time-consuming, requiring about two years for reasonable competence and several years more before the underwriter can be regarded as a good investment (Tr. 105, 156, 1116, 1400). The need for numbers of skilled underwriters is particularly acute because contract bond customers need quick responses, which can best be provided by an underwriter who is stationed in the area and has the ability and authority to commit his firm to the bond without having to consult the home office (Tr. 988). With time and money, underwriters can of course be obtained, but the process slows up entry substantially. Although fidelity underwriters also need specialized training, they do not require the same level of skill as a contract surety underwriter.

Building a network of contract surety agents presents a second hurdle. While established property-liability companies start with agents of their own who can furnish leads to customers, severing the close relationship that customarily develops among surety bond customers, agents, and bond writers is not an easy task (ID f. 106, Tr. 1388-89). This is particularly so because construction bonds must be written quickly, and unfamiliarity breeds delay (ID f. 106). Taking on a contract bond customer requires a searching evaluation of the customer's entire business operation (ID f. 79), a process that most customers do not submit to lightly (Tr. 989).[29] A pre-existing commercial agency network can provide a foothold, but most successful surety agents have to be specialists with their own peculiar skills (Tr. 1389).

[24] We decline to rely on the uncertain possibility that new entry may occur at some unspecified date in the future to reverse the immediate loss of substantial competition caused by this merger. Potential competition is an inadequate substitute for the substantial actual competition that the American General-F&D acquisition eliminated. Entry takes time, especially in these markets where there are impediments to overcome. Moreover, an entry-discouraging level of price, availability and service competition is not necessarily as good as what healthy actual competition would assure. *Ekco Products Co.*, 65 F.T.C. 1163, 1208 (1964), *aff'd*, 347 F.2d 745 (7th Cir. 1965).[30]

B. Number of Competitors

American General argues that the standards of *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966) and *United States* v. *Pabst*

[29] Complaint counsel argue that both capital and the need to obtain state licenses also impede entry. While that may be true for a small potential entrant, the record is clear that neither factor presents substantial problems for a large insurance company with ample resources and pre-existing licenses in the states for other lines of insurance.

[30] *See also RSR Corp.*, F.T.C. Dkt. 8959 (Dec. 2, 1976) [88 F.T.C. 800], *appeal pending*, No. 77-1413 (9th Cir.), 3 CCH Trade Reg. Rep. ¶21,252, at p. 21,154.

Brewing Co., 384 U.S. 546 (1966) are inapplicable to this case because in both those cases the relevant markets had seen a precipitous drop in the number of individual competitors. In contrast, the respondent maintains, the fidelity and surety markets have experienced an expansion of the number of competitors, which is assertedly inconsistent with a trend toward concentration. While the ALJ found that the data of record would not permit a conclusion as to the number of bond writers over the years relevant to this case, he appeared to accept one data source that showed an increase in fidelity writers from 163 in 1967 to 166 in 1968 and to 167 in 1972, and an increase in surety writers from 190 in 1967 to 211 in 1968 to 246 in 1972 (ID f. 114 at p. 34).

Contrary to the respondent's position:

> * * * [N]either *Von's Grocery* nor any other case conditions the finding of a section 7 violation on the presence of a continuous decline in the number of competitors in a market. Merely because the market under scrutiny in *Von's Grocery* was "characterized by a long and continuous trend toward fewer and fewer owner-competitors," [384 U.S. at 278] does not require the presence of that characteristic in a market before concentration and a violation of section 7 may be found. * * * [25]
>
> Even if the market here had more competitors in 1970 than it had in 1950, as Beatrice contends, the record clearly demonstrates that the acquisition of Essex aggravated an already concentrated market. (Citations omitted.)[31]

We see no distinction for this purpose between a Section 7 violation bottomed on contribution to a trend toward concentration and a violation dependent on an already concentrated market.[32] Whether concentration at the top has already occurred or whether it simply threatens to occur, its existence does not depend on the reduction of the total number of competitors. That may be an additional symptom of a lessening of competition, but it is not a necessary condition. Indeed, there is no inconsistency between a competition-injuring trend toward concentration and an *increase* in the number of individual competitors. New entrants may simply be prospering under the umbrella of weakened competition or responding in small part to rapidly increasing demand, without posing an immediate or certain threat to the leaders.[33]

C. Individual Entrants

The respondent also contends that new entrants have appeared who can counterbalance the anticompetitive effect of the American General-F&D acquisition. In a way, of course, the concentration ratios rebut the contention: even after the acquisition, fidelity concentration has

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[31] *Beatrice Foods Co.* v. *FTC*, 540 F.2d 303, 312 (7th Cir. 1976).

[32] As previously noted, concentration levels in fidelity and surety are not substantially lower than in the *Beatrice* brush-and-roller market, in any case.

[33] Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 312, n. 261 (1960).

continued to grow unabated, and surety concentration has not declined, despite whatever new entry may have taken place. All the same, we will consider the most prominent examples of new entry offered by the respondent.

[26] 1. *Employers of Wausau.* The head of Employers' new surety department testified that his company expected to write $1-1.2 million in direct surety premiums in 1974, after having entered the field in the summer of 1973. He expected Employers' surety operations to be nationwide about six years after their inception, with a projected premium volume of about $5 million (Tr. 876-879). It is evident that even if it meets its projections, six years after entry, Employers would still have a long way to go before it would approach the significance of the firms combined by this acquisition. Moreover, Employers' asserted status as a significant entrant rests almost entirely on projections; given the checkered history of other surety entrants, its predictions cannot be greeted without skepticism.[34]

2. *Safeco.* Safeco appears to have expanded its surety writings considerably in the East and Southeast since 1967 (Tr. 1112-1115), but not from a standing start. Safeco or its parent was a significant factor in the surety industry as long ago as 1955 (RX 203-revised). Safeco had years of surety experience and a considerable foothold east of the Mississippi in 1967; it is a new entrant only under a rather liberal definition of the term.

3. *Travelers.* Travelers entered surety bonding in 1940 or 1941, and in 1973 was ranked third in the nation. Travelers' 30-year struggle to reach top ranking in the surety market, offered by the respondent as an example of *ease* of entry, is persuasive evidence of the opposite (ID f. 148a).

4. *Argonaut.* After a rather rapid expansion of its surety writings since entering the field in 1959, Argonaut encountered serious losses in 1973 and 1974. Argonaut's vice president in charge of bonding operations testified that the company had expanded too quickly, and hired underwriters who—despite prior experience—wrote bonds that went sour. As a consequence, four of Argonaut's nine district managers were removed, and the company made substantial changes in its underwriting policy (ID f. 148c; Tr. 1672-1680). Like Travelers, Argonaut's experience tends to confirm the existence of entry hurdles rather than to disprove them.

[27] 5. *Great American.* Great American "reactivated" its surety operations in 1965. The record does not reveal what role its prior experience may have had in its return to the field, or whether it may

[34] When asked about Employers' loss experience, a competitor testified: "It is probably very good. They haven't been in business long enough to have bad experience." (Tr. 1667).

fairly be considered a new entrant. In any case, its premium writings were virtually flat between 1968 and 1972, and a major agency has abandoned it as a source of bonds because of slow response time (ID 148b).[35]

In short, the history of entry corroborates the existence of barriers.

D. Leading-firm Symmetry and Turnover

American General advances a pair of related arguments to escape the market structure data. The data are misleading, the respondent maintains, because (1) the top ranking firms are relatively equal in size to each other, and thus able to limit each other's market power, and (2) significant changes in the composition and rank of the market leaders reveal a degree of competitive intensity that belies the concentration ratios.

Symmetry in size among the market leaders is a factor the Commission has taken into account in assessing the competitive impact of a merger: "A given level of concentration measured by aggregate market shares held by top firms may portend different market conditions depending upon whether firms within the grouping are relatively equal or quite disparate in size, with equality of size evidencing a more favorable climate for competition." *Warner-Lambert Co.*, 87 F.T.C. 812, 870 (1976).[36]

[28] An asymmetrical oligopoly may aggravate whatever lessening of competition may result from a merger; but a symmetrical oligopoly hardly means that no injury to competition is likely to occur.

It is also worth noting that, in both the surety and fidelity markets, concentration ratios and the market share of the leading firms were higher than in the ethical drug market in *Warner-Lambert*. In addition, unlike *Warner-Lambert* in which the challenged merger created merely the fifth ranking firm in the ethical drug market, this acquisition assembled a leading firm in both markets, and produced a considerably greater asymmetry between the first and second ranked firms than had existed before:

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[35] The respondent also cites Kemper, Western Surety and Allegheny Mutual, all of which are veterans in surety (albeit license and permit bonds rather than contract bonds, in Kemper's case). None of the three was among the top 15 surety writers in 1973 (RX 233; CPF 233).

[36] The economic authorities cited by the respondent recognize this point, *e.g.*: "Generally, an asymmetrical oligopoly, dominated by one firm rather than having relatively equal-size leading firms, would involve a higher degree of market power. *Although equal-size oligopolists might expect to attempt and possibly achieve considerable joint maximizing of profits*, more definite control would be likely under and *within* a single dominant firm. Equal size among the market leaders makes cooperation riskier and its rewards smaller for each firm, compared with asymmetry." (First emphasis added.) W. Shepherd, *Market Power and Economic Welfare* 40 (1970). ["Respondent's Brief in Support of Proposed Findings," Appendix I, at 2 (March 7, 1975)]. *Accord:* Scherer, *Industrial Market Structure and Economic Performance* 183 (1970).

	No. 1	*No. 2*	*No. 2/No. 1*
ethical drugs			
pre-acquisition	7.37	6.52	.88
post-acquisition	(no change)		
fidelity			
pre-acquisition	8.9	7.6	.85
post-acquisition	10.7	8.9	.71
surety			
pre-acquisition	8.2	8.0	.98
post-acquisition	12.4	8.2	.66

(Source: 87 F.T.C. 910; ID f. 110,113)

in short, while we have considered the comparative size of leading firm shares in these markets, their arguable symmetry is nevertheless consistent with a probable lessening of competition (especially in view of the acquisition's effect on disparity between the leaders).

[29] Neither do we find changes in composition, rank or market share among the leaders that cast doubt on the ALJ's conclusion. In surety, in fact, measured by direct premiums, the market leaders moved in virtual lockstep through the decade preceding the American General-F&D acquisition. In 1959, U.S. Fidelity & Guaranty led the way, followed by (respectively) F&D, Aetna and Travelers (RX 236a). In 1968, the year of the acquisition, they were arrayed in exactly the same order, although each (with the exception of U.S. Fidelity & Guaranty) had increased its market share (ID f. 113). The top four consisted of the same companies from 1959 to 1968 and indeed (the ALJ found) through 1973 (ID f. 146). In other words, what the respondent characterizes as the "raw concentration data" (RAB 61) lose none of their significance even if these additional factors are assessed.

The fidelity market was not as stagnant as the surety market in the pre-acquisition period, but it still displayed convincing indicia of stability. The following table traces the history of the 1959 industry leaders:

	1959		*1963*		*1968*	
	Rank	*Share (%)*	*Rank*	*Share (%)*	*Rank*	*Share (%)*
F&D	1	7.3	1	7.7	3	7.4
Hartford	2	6.5	3	6.2	5	6.7
U.S. Fidelity and Guaranty	3	6.3	2	6.3	8	5.0
Fireman's Fund	4	5.9	5	5.6	6	5.3
		26.0		25.8		24.4

(Sources: RX 235a, CX 96-D, ID f. 113)

While each of the 1959 leaders slipped moderately in terms of rank, the

striking fact about their fates is that the group did not suffer significant losses in market share. Individually, only U.S. Fidelity & Guaranty experienced so much as moderate loss of share. The new leaders, in other words, have made their gains primarily at the expense of the smaller members of the industry, which is apparent from the substantial increase in four- and eight-firm concentration over the period. In addition, we find nothing to cast doubt **[30]** on the ALJ's conclusion that the fidelity market, like the surety market, was led by a small group of companies throughout the relevant period, or that the concentration ratios and concentration trends do not misstate the degree of competition present.

E. F&D's Multiline Competitors

The respondent advances a constellation of arguments all bottomed on the same general premise: that F&D on its own faces a bleak future in contending with its larger and more diversified competitors. Several of these arguments carry little weight, however. The respondent contends that the sheer disparity in assets and premium volume in non-bonding lines (*i.e.*, insurance) between F&D and its major competitors should be taken into account in assessing the acquisition's impact. Similarly, it is argued that the big property-liability insurance companies gain a competitive advantage over F&D through their large networks of agents and brokers, and because they sell their other lines of insurance to the same classes of consumers who are F&D's bond customers.

The problem with all of these points is the same. F&D has been competing successfully for decades with these selfsame large property-liability companies, despite their larger assets, larger premium income, more extensive agent and broker organizations, and customer contacts.[37] There **[31]** is no dispute that from 1962 through the acquisition (and even beyond) F&D has expanded its premium volume, maintained a market share that kept it among the industry leaders, and operated efficiently with a loss ratio well below the industry average (ID f. 26-29).

The only nexus the respondent has suggested between the size of the

[37] The respondent dwells on the example of Continental, which assertedly used its considerable resources in other fields to expand its fidelity and surety market share at will (RAB 49; RRB 32-34; Tr. 473-475). The implication is that Continental's abrupt growth came at the expense of bond writers that lack its size and diverse lines. But, as the respondent itself has pointed out, *all* of the top fidelity and surety bonding companies are also big general property-liability firms. Unless we indulge in the unlikely assumption that Continental's gains were entirely F&D's losses, it is difficult to attribute its direct premium increases to brute strength alone, since it was in large part picking on competitors its own size. Moreover, it is revealing that Continental's expansions in both markets were followed by retrenchment necessitated by what the Continental witness described as unsatisfactory "experience patterns." (Tr. 473, 475). We have already discussed the evident hazards of overhasty expansion, at least in surety bonding. A fair inference is that Continental, like Argonaut, found it easy to write new bonds but only at the price of some costly mistakes.

property-liability companies and their ability to profit at F&D's expense is the advent of various devices to combine bonds with other lines of coverage: package policies, "packaging" of several policies to sell to a single client, and account selling.[38] In surety, the respondent argues that account selling poses the primary threat to F&D's market position. (Surety bonds are not sold in package policies.) Full-line companies doubtless possess some advantages over specialized firms such as F&D in marketing surety bonds. The availability of other lines may allow a lower price to be offered (Tr. 702). The multiline company can dangle insurance coverage on an otherwise doubtful risk as an inducement to place the bond with it as well (Tr. 1565). Dealing with one insurance company rather than several may be more convenient.

But there is little evidence in the record of the effects on F&D of the account selling device. F&D's president could name only a single specific account the company had lost to account selling (Tr. 703), although he listed other contractors for whose business he said F&D could not compete (Tr. 706-7). The ALJ found that F&D's direct surety premium volume grew steadily from 1962 through 1972 (with a slight decline in 1973), and between 1962 and 1972 outpaced the industry growth rate in surety (ID p. 11). F&D's ability to do better than hold its own is particularly impressive since there is no dispute that all surety is reported separately, even if it is sold through account selling. Clearly, then, F&D is competing successfully even with multiline companies who attempt to market surety bonds through account selling. The respondent cites declines in [32] F&D's surety market share, measured by direct premiums, that have occurred since 1970 (RAB 56). But all of its market share slippage has taken place after the acquisition, and is entitled to little weight, at best.[39]

In fidelity, F&D's multiline competition is channelled primarily through package policies, including the previously discussed CMP (commercial multi-peril policies). As in surety, however, F&D has expanded its straight fidelity premiums despite competition from package policies (ID p. 11). Moreover, F&D has developed its own multiperil policy (called "SMP") for financial institutions, which comprise about 60 percent of its fidelity business (ID f. 50, 102; Tr. 1696, 1707). Although most of F&D's fidelity is written outside the package, its president characterized his company as highly competitive in its SMP policy (Tr. 1708, 1705). F&D regarded its vulnerability to multiline competition for financial institution business as much reduced by

[38] The distinction between "packaging" of policies and account selling is that the former need not all be obtained from the same insurance company, while account selling involves an insurer trying to place as many of its own policies as possible with a customer (ID p. 28, n. 6, 7A).

[39] Account selling, in addition, is aimed primarily at larger accounts—those generating at least $100,000 in annual total premiums (ID p. 28, n. 7A, as modified in the Appendix).

SMP (RX 146m); although the policy has been slow to show a profit, it was expected to break into the black in 1974 (Tr. 1702-3).

In fidelity bonds other than those sold to financial institutions, F&D has defended its market position to a degree by offering discounts when additional coverages are written by another carrier (ID p. 62). In addition, F&D actively pursued alternative means of offering other commercial insurance coverages itself. Although the price tag was high, F&D considered developing its own CMP policy in 1969 and reinvestigated the option in 1974 (RX 146, 145). F&D also considered either acquiring or forming a holding company with other, complementary insurance companies. It was expected that the new firm could write package policies including fidelity, or offer multiline services to F&D's contractor accounts, or both (RX 98-100, 109; Tr. 730-741).

In addition, F&D's specialization brought with it some compensatory advantages as well as disadvantages (compare Tr. 1355-58 with 1376). F&D's specialized services in such areas as loss prevention enabled it to market its bonds successfully at a price somewhat higher than its competitors' (ID f. 88; Tr. 1700-1702), and F&D's promotional literature for agents stressed its sophistication and skill in its area of concentration (CX 49b).

[33] Respondent places great weight on *General Dynamics*. Competition there was in a market—uncommitted coal reserves—where the acquired firm had nothing left to sell, making current production figures an empty statistic. In contrast, premiums express current bond competition quite well, and it would be fatuous to suggest that F&D is running out of bonds to sell. F&D's competitive problems as a bond specialist do not compare with the acquired coal producer's in *General Dynamics*. While the lower court found that additional strippable reserves were simply unavailable, F&D had taken some steps to remedy its lack of full-line facilities and was pursuing others when its efforts were diverted by the American General acquisition. Finally, as the Supreme Court explicitly noted in *General Dynamics*, brand loyalty and distribution systems support the presumption that past sales imply future competitive strength. F&D possessed a national network of agents and branch offices and a staff of expert underwriters. Unlike coal, presumably fungible or nearly so, F&D's services to its bond customers, to judge from its own statements, are exceptional and help it get and hold business.

F. State Regulation

American General presses state insurance regulation as yet another factor militating against the anticompetitive effect of the F&D acquisition.

Whatever the actual impact of state regulation on insurance practices, however, its overwhelming direction is prohibitory: to prevent company failure, overcharging, discriminatory rates, and unfair contract provisions, as well as to achieve a host of other prophylactic goals. But what state regulation manifestly cannot supply are the *affirmative* benefits that flow only from a competitive market structure, including aggressive competition and innovation. The ALJ found that surety and fidelity bond writers compete in service, availability, and price (ID p. 56), and the fact of state regulation cannot compensate in any measure for the probable lessening of that competition attributable to the American General-F&D acquisition. State insurance commissioners cannot order insurance companies to compete; that is the function of the market.

G. "Sophisticated Buyers"

A final factor the respondent alleges that the initial decision neglected is the sophisticated character of the agents who (both the ALJ and the respondent agree) primarily make the decision about which company writes the bond. We [34] infer from the testimony cited by the respondent (R. Reply B. 25-26) that this sophistication consists largely of the agents' ability to search for the company offering the best combination of terms, conditions, and price for their clients' needs. But we fail to see how the agents' perspicacity in locating alternatives can immunize them from market power. Wise choices among alternatives depend in the first instance on the existence of those alternatives.

H. Conclusion

We have evaluated the various factors, individually and collectively, that the respondent suggests mitigate the basic statistical data in this case. We have found nothing to disturb the conclusion that this acquisition may substantially lessen competition in the fidelity and surety markets, and we believe the ALJ was correct in holding it to violate Section 7.

IV. RELIEF AND RESPONDENT'S MOTION TO REOPEN

The respondent has moved to reopen the record for reception of evidence on the circumstances under which Maryland Casualty assertedly withdrew from the bonding business in mid-1976, after sustaining what are described as heavy losses. The respondent argues that Maryland Casualty's exit undermines the ALJ's conclusions on liability, and even if a Section 7 violation is found, eliminates divestiture as an appropriate remedy. We reopen the record to receive the proffered

affidavit, even though we are aware that complaint counsel have had no opportunity to subject it to cross-examination.

The proffered evidence is, however, immaterial as to liability. The existence of a Section 7 violation depends on competitive conditions at the time the record closes, at the latest. "But the force of Section 7 is still in probabilities, not in what later transpired. That must necessarily be the case, for once the two companies are united no one knows what the fate of the acquired company and its competitors would have been but for the merger." *FTC* v. *Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965) [7 S.&D. 1189]. The respondent's decision to shut down Maryland Casualty's bonding operations and to allow F&D to skim the cream by trying to pick up the best accounts is just the sort of post-acquisition evidence subject to manipulation that courts and the Commission have regarded with skepticism.[40] [35] We cannot dismiss the possibility that a respondent under the shadow of a possible divestiture order could impair either its own operations or those of the acquired firm to set up a plausible argument that divestiture is unwarranted.[41]

Nor can we agree with the respondent that its decision to terminate Maryland Casualty's bonding business should be controlling on the question of relief. Surely, American General cannot mean that the effect of the illegal acquisition has been neutralized because Maryland Casualty's less favored accounts have been jettisoned. American General has not re-established either of the acquired firms as an independent competitor, which is what happened in *Foremost Dairies Inc.*, 71 F.T.C. 56 (1967), the case on which it relies. It has not even eliminated the area of competitive overlap.

What American General appears to have done is put itself in a position so that the Commission's principal option is to order divestiture and convert American General into a potential competitor (although the disappearance of illegally acquired assets did not prevent the Commission from requiring the reconstitution of the acquired firm in *Ekco Products Co.*, 65 F.T.C. 1163 (1964)). The question is not, however, a new one. In *Diamond Alkali Co.*, 72 F.T.C. 700 (1967), the respondent closed and dismantled all of its cement manufacturing facilities except those it had gained through the challenged acquisition, and it did so after the Commission had issued its complaint. The remaining plant enabled Diamond to keep its own previous market share and the share of the acquired firm. Both these factors parallel the situation into which American General has chosen to place itself. Despite Diamond's vehement declaration that it would never enter the cement business again if required to divest, which the Commission took at face value,

[40] *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 504 (1974).

[41] *Litton Industries, Inc.*, 85 F.T.C. 333, 385 (1975).

divestiture was ordered. Although the prospect of actual reentry was not bright, industry members were likely to perceive Diamond as a potential entrant, and the Commission saw its only other alternative as "simply throwing up our hands and surrendering all chance that this Section 7 violation will be remedied." 72 F.T.C. at 751.

[36] Divestiture is equally appropriate here. Although the cement market in *Diamond* was extremely concentrated and entry barriers were high, the lesser but still substantial concentration and barriers in fidelity and surety render American General valuable as a potential competitor. Moreover, as the respondent itself has pointed out, bonding capabilities are a valuable adjunct to other insurance lines, and insurance companies have entered the bonding field to offer clients that additional service (RPF III-34, 35). The same incentive applies to American General as well. Prior experience and interest in the field also suggest that, if divested of F&D, American General would be likely to return. One former bond writer has reentered the market after a period of inactivity (ID f. 148b), and F&D's president testified that he regarded another company that had phased out of surety bonding as a potential entrant (Tr. 858). Finally, Maryland Casualty plans to retain a bonding subsidiary, and a variety of bonding business in miscellaneous categories (McCullough Aff. pp. 8-10). To the extent of the business retained, American General remains an actual competitor. It is evident that if American General chooses to expand its bonding operations, whether through Maryland Casualty or by other means, it still possesses at the very least a share of the market and a reserve of experienced personnel to facilitate reentry. In summary, we regard divestiture as offering the fullest possible measure of relief under the circumstances, despite Maryland Casualty's apparent partial withdrawal.

American General argues that the six months permitted for divestiture of F&D in the ALJ's order is unreasonably short, and urges instead that three years be allowed. The respondent has cited no extraordinary factors complicating this particular divestiture that would justify such an unusually lengthy period of time. In oral argument, complaint counsel suggested that one year would be ample time and would not be inappropriate. We will modify the ALJ's order to require divestiture within one year of the date the order becomes final.

The respondent also suggests that the ALJ's order may be unclear because it mentions divestiture of stock and of assets. We fail to see the unclarity. The ALJ's formulation is common in Commission divestiture orders. *Avnet Inc.*, 82 F.T.C. 391, 486 (1973); *Ash Grove Cement Co.*, 85 F.T.C. 1123, 1150 (1975). We see no reason to modify the order in this respect.

[37] Neither can we agree with the respondent that a ten-year prohibition on acquisitions in these markets without Commission approval is unwarranted. Clearly, the Commission has the authority to order such relief. *Abex Corp.* v. *FTC*, 420 F.2d 928 (6th Cir.), *cert. denied*, 400 U.S. 866 (1970). American General entered the fidelity and surety market through the acquisition of a leading firm, and followed four years later with the acquisition of a major competitor. It is not unreasonable to suppose that such a path could be followed again. Both markets have experienced a trend toward increased concentration. Even if divestiture relegates American General to the status of a potential competitor, the Commission is under a duty to ensure that its reentry, should it occur, does not have anticompetitive consequences. The ban is not absolute; American General is simply required to obtain Commission approval. Under the circumstances, we deem the ten-year restriction on acquisitions appropriate.

Complaint counsel appeal from the ALJ's failure to enter an order requiring American General to divest a $20 million special dividend paid to it by F&D in 1973, and regular dividends which have been paid to American General since 1970 rather than retained to supplement F&D's capital and surplus. In view of the state of the record, we decline to overturn the ALJ's refusal to order the "divestiture" of these dividends. Complaint counsel have failed to demonstrate what the ultimate effect of such action would be. They have not established that this action constituted an independent violation of Section 7 of the Clayton Act, nor have they shown that F&D's competitive vitality was impaired. Neither is there an explanation why the forced divestiture of cash would do more than increase the sale price of F&D on a dollar-for-dollar basis.

An appropriate order will issue. [38]

Appendix

The Findings of Fact and Conclusions of Law set out in the Initial Decision of the Administrative Law Judge are adopted by the Commission except to the extent they are qualified or supplemented in the Commission's Opinion and in this Appendix.

The following Findings in the Initial Decision are modified as indicated:

I.D. f. 41, 46: Change "Fs. 36-39" in the last line of both findings to read "Fs. 42-45" (Typographical error).

I.D. f. 101: Delete footnote 7A and substitute: "A related selling device is account selling, an effort to sell as many lines to a customer as possible. The record shows that account selling is limited to accounts generating $100,000-$300,000 in total annual premiums (Tr. 212-213, 1746). Account selling gives multiline companies certain advantages over specialized companies, including potentially lower prices and the ability to offer insurance on otherwise doubtful risks in order to write an attractive bond (Tr. 702, 1334-35, 1565-66). There is little evidence of actual harm to F&D from account selling, however. Although F&D's president said his company could not compete for certain

accounts, he could name only one account actually lost to account selling (Tr. 703, 706-7) (Compare RX 143 with Tr. 1746-7)."

I.D. f. 107: Add after last sentence: "The need for capital and surplus, and state licenses, primarily affects small bond writers."

I.D. f. 114: Delete the last two sentences of the second paragraph, and substitute: "One cannot ascertain the change in numbers of *all* companies writing fidelity or surety between 1963 and 1968, for example, by comparing the Surety Association "membership and affiliate" figures for those years as shown on RX 226 (160 and 194, respectively). The figures include companies under common ownership but count them separately (Tr. 1447-48; CX 150). In addition, a Surety Association representative testified that the 1963 figures were consistent with the number of Association affiliates comprising "members" and "subscribers" in 1963 (Tr. 1448); but the Association representative also testified that there were two other classes of affiliates at that [39] time ("manual purchasers" and "statistical filers"), whose presence he did not account for in the 1963 figures (Tr. 1446-47; compare Tr. 1449; see Tr. 2800-1). In short, the figures in RX 226 are too confused to support any valid conclusions with respect to the number of fidelity and surety writers."

I.D. f. 142: In the sixth sentence, change "7.6" to "7.4". (Apparent error in copying from exhibit.)

The Commission makes the following additional finding:

Shortly before its acquisition by American General, F&D was actively seeking to acquire, or form a holding company with, insurance companies that would give F&D multiline capacity but which were not major competitors in fidelity and surety (RX 97, 98, 99, 109). Although F&D's management considered acquisition of a complementary company the better alternative, consideration was also given to internal development of the capacity to offer other insurance lines (RX 146).

Final Order

[1] This matter having been heard by the Commission upon the appeal of respondent from the Initial Decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to sustain the Initial Decision with certain modifications:

It is ordered, That the Initial Decision of the administrative law judge, pages 1-48, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent indicated in the accompanying Opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following Order to cease and desist be, and it hereby is, entered: [2]

ORDER

It is ordered, That:

I

Respondent, American General Insurance Company (hereinafter

"American General"), a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within one year from the date this Order becomes final and subject to prior approval of the Federal Trade Commission, divest absolutely and in good faith, all stock, assets, title, properties, interest, rights and privileges, of whatever nature, tangible and intangible, acquired by American General as a result of its acquisition of Fidelity and Deposit Company, together with all contract rights, premiums payable, buildings, improvements, equipment, additions and other property of whatever description which has been added since that acquisition or hereafter shall be added to the property or assets of Fidelity and Deposit Company of Maryland ("Fidelity and Deposit"), so as to restore Fidelity and Deposit as a going concern and effective competitor in the fidelity and surety bond businesses.

II

By such divestiture none of the assets, properties, title, interest, rights or privileges described in Paragraph I of this Order shall be sold or transferred, directly or indirectly, to any person who is at the time of divestiture an officer, director, employee or agent of or under the control or direction of American General or any of its subsidiary or affiliate corporations, or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common and/or preferred stock of American General.

III

No method, plan or agreement of divestiture to comply with this Order shall be adopted or implemented by American General save upon such terms and conditions as first shall be approved by the Federal Trade Commission. [3]

IV

Pending divestiture, the assets and business acquired from Fidelity and Deposit shall be maintained and operated as a separate corporation with separate books of account, separate management, separate assets, and separate personnel.

V

Pending divestiture, no substantial property or other assets of the separate corporation referred to in Paragraph IV herein shall be sold, leased, otherwise disposed of or encumbered, other than in the normal course of business, without the consent of the Federal Trade Commis-

sion, and American General shall not commingle any assets owned or controlled by such separate corporation with any assets owned or controlled by American General.

VI

For the period of three years from the date on which this Order becomes final, no individual employed by Fidelity and Deposit or the separate corporation referred to in Paragraph IV herein shall be employed by American General.

VII

Pending divestiture, the underwriting departments and selling and management personnel of the separate corporation referred to in Paragraph IV herein and American General shall be conducted independently of each other.

VIII

Pending divestiture, American General shall maintain the separate corporation referred to in Paragraph IV herein as an independent entity and take no steps to impair such corporation's economic and financial position.

IX

American General shall forthwith cease any and all representation on the board of directors of Fidelity and Deposit and cease and desist from taking any steps to nominate, seat, or admit any representative of Fidelity and Deposit to the board of directors of American General. [4]

X

Fidelity and Deposit shall forthwith cease any and all representation on the board of directors of American General and cease and desist from taking any steps to nominate, seat, or admit any representative of American General to the board of directors of Fidelity and Deposit.

XI

American General shall forthwith cease and desist from acquiring, directly or indirectly, for a period of ten (10) years from the date on which this Order becomes final, without the prior approval of the Federal Trade Commission, the share capital, assets or interest of any corporation engaged in fidelity and/or surety underwriting in the United States.

The provisions of this paragraph shall include any arrangement pursuant to which American General acquires the market share, in whole or in part, of any concern, corporate or noncorporate, which is engaged in fidelity and/or surety underwriting in the United States, (a) through such concern's discontinuing the underwriting of such product lines or (b) by reason of such concern's discontinuing the underwriting of such product lines and thereafter transferring to American General customer and account lists or in any other way making available to American General access to customers or customer accounts.

XII

Within thirty (30) days from the effective date of this Order and every sixty (60) days thereafter until it has fully complied with Paragraph I of this Order, American General shall submit a verified report in writing to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying or has complied therewith. All such reports shall include, in addition to such other information and documentation as may hereafter be requested, (a) a specification of the steps taken by American General to make public its desire to divest Fidelity and Deposit, (b) a list of all persons or organizations to whom notice of divestiture has been given, (c) a summary of all discussions and negotiations together with the identity and address of all interested persons or organizations, and (d) copies of all reports, internal memoranda, offers, counter-offers, communications and correspondence concerning said divestiture. [5]

XIII

American General shall notify the Commission of any proposed change at least 30 days prior to the proposed change in the corporate respondent, American General, such as dissolution, assignment or sale resulting in the emergence of a successor corporation(s), the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

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ADVISORY OPINIONS

Marking of jewelry produced from a 14 karat gold sheet laminated upon sterling (File No. 773 7004).

Opinion Letter

February 18, 1977

Dear Mr. Goldberg:

This is in response to your request for an advisory opinion concerning the marking of articles of jewelry produced from a 14 karat gold sheet laminated upon sterling, the gold sheet constituting at least 1/20th of the weight of each jewelry item's metal content. The items of jewelry contemplated for manufacture include bracelets, necklaces and earrings. You propose marking such articles "Sterling and 14K" or "Sterling + 14K," on the premise that such markings are permitted by Section 4 of Commercial Standard CS51-35, "Marking Articles Made of Silver in Combination with Gold."[1] In the Commission's opinion, the use of either marking would have the tendency and capacity to mislead consumers and thus be in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

The sample of the laminated metals submitted to the Commission might be described as having an obverse side of yellow gold and a reverse side of silver. The different metals in the sample provided are clearly distinguishable, but casual inspection cannot determine the relative thicknesses of the gold layer and the silver. The 1:20 ratio you have specified, however, does no more than meet the minimum requirements for "gold fill," "gold plate," or "gold overlay." See 16 C.F.R. 23.22(c)(2).

The markings "Sterling and 14K" or "Sterling + 14K," in the Commission's view, could suggest to consumers that the amounts of gold and silver in the articles of jewelry so marked are approximately equal or, at least, would suggest more than five percent 14K gold. Such markings, accordingly, would have the capacity to mislead consumers.

The Commission does not construe Commercial Standard CS 51-35 to justify a different conclusion. In the circumstances presented, a marking must be used which makes clear to consumers the relative

[1] The Standard, a voluntary guide developed by industry members with the cooperation of the National Bureau of Standards, was recently redesignated as PS68-76.

proportion of yellow gold to silver, either by use of a "gold plate" designation (or related designations set forth in the Trade Practice Rules for the Jewelry Industry, 16 C.F.R. 23.22(c)(2)) or by preceding the gold fineness designation with a fraction consisting of the ratio of the weight of the 14K gold to the weight of the metal in the entire article, a marking clearly not inconsistent with the Commercial Standard.

This opinion is limited to the circumstances presented by your sample, *i.e.*, where silver is combined with yellow gold and both the gold and silver surfaces are equally visible in jewelry made from the laminates.

Assuming that the sterling and 14K yellow gold meet the designated quality standards and that the 14K gold is at least 1/20th the weight of the metal in any finished article of jewelry, the following markings, in the Commission's opinion, would comply with Section 5 of the Federal Trade Commission Act:

Sterling and [or +] 14K Gold Plate*

14K Gold Plate on Sterling

Sterling and [or +] 1/20th [or other fraction] 14K Gold

* "Gold Filled," "Gold Overlay," or "Rolled Gold," or their abbreviations set out in 16 C.F.R. § 23.22(c)(2), may be used if they are appropriate for the laminating process.

By direction of the Commission.

Letter of Request

15 April, 1976

Dear Mr. Tobin:

My company has been in business three years and we manufacture jewelry for the finest retail stores in the United States.

We have developed a new process whereby we laminate, by mechanical means, a sheet of 14 karat gold directly upon sterling silver. We enclose a small sample of our product. Please note, the gold is easily distinguishable from the sterling.

The purpose of this letter is to request a formal advisory opinion under the Federal Trade Commission Act to determine whether or not this item of jewelry made from 14 karat gold and sterling can be stamped 14 karat gold plus sterling in accordance with Commercial Standard CS

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51-35, Marking Items Made of Silver in combination with Gold, as recognized in the Federal Trade Commission Trade Practice Rules for the Jewelry Industry, Rule 23 (see footnote No. 4).

The weight of the 14 karat gold to the weight of the entire article will be at least 1/20th of the weight of the entire metal or better.

Commercial Standard CS 51-35, we believed, would apply, since the silver of the 14 karat gold is easily distinguishable, one part from the other part. Paragraph four of this Standard would permit, we believe, this item to be stamped "Sterling and 14K" or "Sterling + 14K".

We are currently not manufacturing this product nor selling the same and request this opinion so that we may correctly designate our jewelry to our retailers for the protection of the consumer.

Since jewelry is a fashion item, and since we would like to produce this product for our Fall market season, we would greatly appreciate your efforts in forwarding this opinion to us no later than June 30, 1976. Your cooperation within this period of time would be, as stated, greatly appreciated.

Sincerely,

/s/ VICTOR GOLDBERG
President

Association's proposed plan to provide gasoline dealer with instant identification intended to assure motorists of the credibility and reliability of such dealer's performance for fill-up customers at full service gasoline pump islands (File No. 773 7003).

Opinion Letter

March 5, 1977

Dear Mr. Houston:

This is in response to your request for an advisory opinion on a certification plan developed by your association for members of the Georgia retail petroleum industry.

Under this plan, as we understand it, participating petroleum retail dealers would provide to "fill-up" customers at designated full service islands, the services of (1) cleaning their windshields and (2) offering to check or checking under their hood. Dealers who certify their provision of the services to customers ordering a fill up of gasoline at one or more designated service islands may participate in the program and receive a seal to post indicating their participation in the program. As we understand the program, retail dealers with multi-island stations could participate on a single island basis.

For the reasons set forth below, the Commission is unable to approve the program.

With respect to the antitrust implications of your proposal, your letter states that "* * * all members of the industry may participate in the proposed plan who perform at least the minimum service for fill-up customers." Your proposed seal, however, bears the words, "Dealer Operated—An Independent Small Businessman." It is therefore unclear whether service stations not owned and operated by dealers may participate in the program. If the program is in fact open to any industry member who supplies the requisite services, regardless of ownership or operation, the Commission finds the plan unobjectionable on antitrust grounds. If a class of stations is excluded on grounds other than their failure to offer and provide those services, however, a question would be raised whether the program could have an illegal anticompetitive effect, and the Commission would be unable without a further factual inquiry, not undertaken in the context of advisory opinions, to approve it. Federal Trade Commission Procedures and Rules of Practice, 16 CFR 1.1(c).

This is not to say that such a program could not result in or facilitate

violation of the antitrust laws. The program could present occasion to fix prices or otherwise to limit competition. For example, if participants agreed explicitly or implicitly to withhold the services provided under the program from "partial fill" customers, or agreed that self-service or other kinds of sales would not be offered to the public, violations of the antitrust laws would result. That retail dealers with multi-island stations may participate on a single-island basis is an extremely important consideration in the Commission's evaluation of the plan.

Fees for participation in the program might best be structured in such a way that association members and nonmembers pay equal shares of program costs. Nonmembers of the association might be charged a higher fee than members if the differential simply insures that nonmembers, who do not pay association dues or assessments, are bearing an equal share of the costs of the program.

Section 5 of the Federal Trade Commission Act prohibits not only antitrust violations in the form of unfair methods of competition, but also unfair or deceptive acts or practices in or affecting commerce. Your proposed program is deficient in certain respects that could lead to illegal unfairness or deception.

You state in your promotional material that the Golden Triangle is "your assurance for receiving the above services when you drive up to a full service gasoline pump island and say—Fill er up." The services specifically designated are cleaning the windshield, checking tires for dangerous conditions, and offering to look under the hood, to check the oil, battery, fan belts, look for faulty or loose wiring and leaking brake or fuel systems. Yet participating dealers only agree to clean windshields and either check or offer to check under the hood. The affidavit should provide that all of the services specified in advertising material will in fact be provided. Of course, both the Association and the individual participants in the program bear the responsibility to ensure not only that the services are promised but also that they are actually provided. The Association should adopt a program of verifying compliance with the program, which should consist at least of spot-checking at appropriate intervals as well as investigating complaints.

In addition, the seal represents that the participant offers "full service at the pump island." In our view this implies that the servicing is available at the designated island to those willing to purchase gasoline. In fact, under the program, dealers commit themselves to provide "full service" only to those who order a fill up. We believe the limitation

regarding a fill up must either be prominently displayed on the seal or otherwise disclosed with prominence equal to that of the seal.

Finally, the Commission sees no problem in principle in franchising the program so that it would be available through trade associations in other states, if the objections raised in this opinion to the present form of the program are removed.

By direction of the Commission.

*Letter of Request**

October 22, 1975

Dear Sirs:

This is to request an advisory opinion on a proposed plan developed by this Association for all members of the industry.

The objective of the proposed plan is to provide the gasoline dealer with instant identification intended to assure motorists of the credibility and reliability of such dealer's performance for fill-up customers at full service gasoline pump islands.

The proposed plan is intended to insure availability of minimum performance which the consumer may expect at a full service pump when the consumer has ordered a fill-up of his tank. Only a general certification (See Exhibit A) that such minimum performance is regularly provided is proposed. Competition and public demand will continue to dictate the quality and extent of performance above the minimum described in this proposal.

This Association, recognizing that professionalism and credibility are valuable to its members, has developed the proposed plan to identify to consumers gasoline dealer locations where minimum performance is certain for fill-up customers. It is proposed that all members of the industry may participate in the proposed plan who perform at least the minimum service for fill-up customers. All participants will voluntarily and without implied or expressed coercion certify in writing to the Association of their willingness to assure such minimum performance is maintained. In return for the certification of such practices by any member of the industry the Association will make available the symbol illustrated in the copy attached (Exhibit B) for posting on his premises.

* The exhibits mentioned in the requesting letter are not reproduced herein but are available for inspection at Public Reference Branch, Room 130, Federal Trade Commission, Washington, D.C.

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With reference to the illustration depicting the symbol for performance, it is proposed that the non-member of the Association will be supplied the identical signing with the exception that the word "member" shall be removed and the words "sponsored by the" shall be substituted. To fulfill the credibility intended under the proposed plan for public confidence in performance at locations where such symbol is displayed, it is deemed necessary to use the Association name in said signing. In the alternative, said symbol could be provided without other wordage to avoid any objection to the use of the Association name should the Commission feel this is necessary.

To insure consistency and quality in the use of the symbol and/or signing, it is intended that the Association will retain all rights for reproduction of authorized signing under this plan. Only approved designs as may from time to time be developed by the Association will be permitted in the use of said symbol.

By certification to performance as provided in this proposed plan, it is the intention of the Association to provide the symbol as a distinguishable basis for consumer decisions which might not otherwise be apparent.

In addition to providing the member of the industry who chooses to participate in the proposed plan with adequate signing as described above, it is the intention of the Association to provide from time to time promotional pieces it designs for use of said participating members of the industry. Such proposed promotional pieces as are illustrated by the attached sample (Exhibit C) are intended to develop public confidence in the proposed plan. In addition, such promotional pieces will serve as educational tools to inform consumers of the valuable and essential services performed at the pump island by the full service dealer when the customer says to fill his tank. Participating members of the industry would be encouraged to provide non fill-up customers with the best service performance they can provide to the extent it is economically feasible under their individual circumstances.

The use of the proposed promotional piece is intended for participating member dealers to hand to their fill-up customers. Upon receipt by the Association of complaints against any participating dealer, notice is to be given to the participating dealer complained of as a matter of information. In the event substantial numbers of complaints by consumers are received advising non-compliance with minimum performance certified to for participation in the purposed plan, said participating dealer shall be given an opportunity to appear before the Board

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of Directors of the Association. The Board of Directors, acting as a committee which shall have the duty to examine the circumstances, shall hear the participating dealers' views and will make judgment whether the facts merit withdrawal of the right to participate in said program. Among the committee's other duties shall be the responsibility for insuring non-discriminatory access to the program by non members of the Georgia Association of Petroleum Retailers.

To effectively focus public attention upon the symbol and the participating industry members, it is intended that the Association may require all participating industry members to contribute to a co-operative advertising campaign to be conducted through public media. At the option of the Association, it is proposed that either a voluntary contributory plan will be implemented or that an assessment for each participating member of the industry will be implemented to support said intended advertising campaign. A Sample copy of the initial ad (Exhibit D) proposed for use in this connection is attached.

It is intended that non members of the Association will receive all promotional materials and the use of the symbol at a cost no greater than those imposed upon comparable Association members for whom comparable services have been rendered.

The Commission is requested to provide an advisory opinion on the general conditions of the proposed plan as outlined above in addition to the specific questions which follow:

1. Can the proposed plan be implemented as above described without danger of the Association being charged with anticompetitive activity?
2. Could the Association establish an annual charge for the use of the symbol and waive payment by members of the Association?
3. Would the Commission view as anticompetitive activity of this Association if as owner of the symbol and above plan this Association attempted to franchise said plan through other gasoline dealer Associations across the Nation with agreements with other Associations requiring uniformity in operation as described above?
4. If the Commission finds one phase of the above described plan to be improper or anticompetitive the Commission is respectfully asked to comment as to the effect of such finding on the remaining parts of said plan.

Thank you for your attention and for your best effort to expedite this request for an advisory opinion.

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Sincerely,

/s/ Jack W. Houston
Executive Director

Magnuson-Moss Warranty Act—Compliance of Ultrafiche System with 16 C.F.R. 702, (File No. 773 7005).

*Opinion Letter**

March 18, 1977

Dear Mr. Raymond:

This is in response to your request for an advisory opinion concerning a proposed method of complying with the Commission's Rule on Pre-Sale Availability of Written Warranty Terms, 16 C.F.R. 702. Your request was made following the Commission's advisory opinion of November 10, 1976, to the National Retail Hardware Association (NRHA) approving use of a microfiche reader system to satisfy Part 702.3(a)(1)(ii) of the Rule. 41 F.R. 53472. The Rule requires a retailer to maintain a binder "or [other] similar system* * *" giving consumers "convenient access to * * * warranties." 16 C.F.R. 702.1(g).

Specifically, you ask whether an ultrafiche viewing system would also satisfy Part 702.3(a)(1)(ii) of the Rule. In addition, you ask whether a retailer wishing to use an ultrafiche system under the Rule must comply with the condition set forth in the advisory opinion to the NRHA that:

> The warranties appear on separate microfiche cards which contain all warranties for a given product class, and only that product class (*e.g.* vacuum cleaners), and which do not contain any other product information* * *.

The system you propose is substantially similar to the NRHA microfiche system. Information is stored on cards in greatly reduced photographic form. The cards can then be inserted into a viewing machine which magnifies the information and displays it in readable form on a screen.

The basic difference between the two systems is that an ultrafiche card contains 2,800 pages of information while a microfiche card typically contains less than 100. You argue that requiring a separate ultrafiche card for the warranties relating to each class of products would defeat the purpose of an ultrafiche system.

The Commission has carefully considered the matters set forth in your letter. It is the Commission's conclusion that the ultrafiche system you propose will satisfy the Commission's Rule if:

* Published in the *Federal Register*, 42 F.R. 15679.

(1) Simple, complete instructions for use of the system are posted on each ultrafiche viewer; and

(2) Personnel in each selling establishment familiar with the operation of the system are available to assist consumers should the need arise; and

(3) Ultrafiche cards used to display warranties contain only warranty information.

The Commission further concludes that the warranties relating to more than one product class may be stored on a single ultrafiche card provided the conditions listed below are met. Moreover, the Commission has reconsidered the requirement set forth in its opinion to the NRHA that the warranties for each product class be displayed on separate microfiche cards. Therefore, the Commission concludes that the warranties relating to more than one product class may be displayed on either a single ultrafiche or a single microfiche card if:

(1) All warranties relating to a product class are grouped together on the same ultrafiche or microfiche card; and

(2) All warranties relating to a particular product class appear on the same row or column of the ultrafiche or microfiche card; and

(3) Each ultrafiche or microfiche card contains a clear product index.

These conditions are required to ensure that consumers have the "convenient access" to warranties required by the Rule.

By direction of the Commission.

*Letter Revising Conditions on Use of Microfiche System**

March 18, 1977

Dear Mr. London:

This is to advise you of a revision of the Commission's conditions on the use of microfiche viewing systems to satisfy the Commission Rule on the Pre-Sale Availability of Warranty Terms, 16 C.F.R. 702.

In its advisory opinion to the National Retail Hardware Association of November 10, 1976, the Commission required separate microfiche cards. Upon reconsideration, the Commission concludes that warranties from

* Opinion letter published in 88 F.T.C. 1027, and 41 F.R. 53472.

more than one product class may be displayed on the same microfiche card so long as the warranties relating to any particular product class all appear on the same row or column of the card and the card contains a clear index of the warranties it contains. A letter setting out the new conditions is enclosed.

By direction of the Commission.

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"Hiatus" requirement of the Trade Regulation Rule of Games of Chance in the Food Retailing and Gasoline Industries (16 C.F.R. 419.1(f)) (File No. 773 7010).

Letter of Response

March 25, 1977

Dear Mr. Rogal:

This is in response to your March 16, 1977, request for an advisory opinion respecting the so called "hiatus" requirement of the trade regulation rule for Games of Chance in the Food Retailing and Gasoline Industries (16 C.F.R. 419.1(f).

The Commission has recently directed its staff to initiate a rulemaking proceeding for amendment of said rule, specifically to include consideration of repeal of Paragraph (f), the "hiatus" requirement. As your request seeks, in effect, individual exemptions from the "hiatus" requirement of the rule, it is not deemed appropriate for advisory opinion.

By direction of the Commission.

Letter of Request

March 16, 1977

Honorable Commissioners:

The undersigned was orally informed today by attorney Edwin F. Dosek of the Commission's Bureau of Consumer Protection that the Bureau's staff has determined to advise the undersigned that the proposed courses of action described in the two attached Requests for Staff Advisory Opinion would violate the Commission's trade regulation rule governing games of chance in the food and gasoline retailing industry. He stated that it was the staff's opinion that extensions of the games for additional thirteen week periods would violate section 419.1(f) of the rule which reads as follows:

> Promote or use any new game without a break in time between the new game and any game previously employed in the same establishment equivalent to the duration of the game previously employed.

Mr. Dosek further advised me that it is the staff's view that under the circumstances presented, *i.e.*, when some of the independent stores which participated in the first run of the game do not wish to participate in the extension or when stores which did not participate in

the first run will participate in the second run, the second run constitutes a "new game" and falls within the quoted rule provision. According to Mr. Dosek the second run is a "new game" because the geographic area will change and the total number of prizes and game chances distributed will change. The staff was not persuaded by the fact that all other aspects of the game will remain exactly the same including the odds or chances of winning a prize in each separate prize category.

The undersigned is at a loss to understand the staff's negative views on these simple proposals. There is absolutely no chance of consumer confusion or deception. The independent stores are scattered widely over a three state area in one instance and an eleven state area in the other. Newspaper advertising is the only medium employed since the rule bans the use of radio or television advertising. The stores prepare and disseminate their own advertising on a town-by-town or area by area basis.

This request points up the anti-competitive nature of the rule provision quoted above. Here we have independent grocery stores blocked in a competitive fight with large retail food chains. I do not have any current information as to the competition which faces the Malone and Hyde Stores but as the attached Request on behalf of Associated Grocers of Colorado points out, that group is faced with competition from two large chains which together control in excess of 80 percent of the food retail market in that three state area. What possible public interest is served by denying to these independent grocers the right to employ this completely lawful method of competition?

In closing I wish to point out that this request differs from the request submitted by Fox Grocery Company in that we are not requesting the opportunity to engage in an entirely new and different game but merely requesting the opportunity to extend the same promotion with slightly different participants.

Finally, it is urgently requested that the Commission handle this request with all possible speed. A refusal to respond within the next ten days will, in effect, constitute a denial for orders for printing the game materials must be in the hands of the printer by March 25, 1977.

Respectfully submitted,

/s/ Willaim W. Rogal

First Attachment

March 8, 1977

Dear Mr. Dosek:

This request for a staff advisory letter is submitted on behalf of Glendinning Companies, Inc. Glendinning is a marketer of game of chance promotions utilized by food retailers and others in connection with advertising their goods and services.

On January 12, 1977, approximately 293 retail stores affiliated with Malone and Hyde commenced a thirteen weeks game promotion marketed by Glendinning. The 293 stores are located in the states of Alabama, Arkansas, Indiana, Illinois, Kentucky, Louisiana, Mississippi, Tennessee, Texas, Virginia and West Virginia. The Malone and Hyde stores are grouped into divisions for purposes of organization. The 293 stores now engaged in the game promotions comprise five distinct Malone and Hyde divisions.

Glendinning has recently been notified that some, but not all, of the five divisions wish to renew the game promotion for an additional thirteen weeks when the original promotion terminates in April. Of course, this means that the promotion will be somewhat smaller during the contemplated second run. The odds of winning each separate prize will remain exactly the same but the total number of tickets and the total number of prizes will diminish in proportion to the diminished retail store participants.

It is important to realize that each of the divisions of Malone and Hyde are geographically distinct and separate. The stores in each division prepare and disseminate their own advertising, thus consumers in one division do not see advertising disseminated in another division or divisions. Thus, there is absolutely no chance of consumer confusion by reason of the fact that one or more of the five divisions may decide not to renew the game for an additional thirteen weeks.

In compliance with the Trade Regulation rule, Glendinning and Malone and Hyde have been mixing game chances and making the requisite disclosures over the entire eleven state area encompassed by the Malone and Hyde divisions. They will follow the same procedure during the second run. The new advertising will properly disclose the new diminished area in which the game will be played.

Glendinning requests advice as to whether the procedure outlined above is acceptable. Of course all provisions of the Trade Regulation

rule will be scrupulously followed. Time is of the essence in this request, since advance orders and commitments for the new tickets and game material must be placed within the next few weeks.

Sincerely,

/s/ William W. Rogal

Second Attachment

March 3, 1977

Gentlemen:

This request for a staff advisory letter is submitted on behalf of Glendinning Companies, Inc. and Associated Grocers of Colorado. Glendinning is a marketer of game of chance promotions utilized by food retailers and others in connection with advertising their goods and services. Associated Grocers of Colorado is a cooperative group of independent food retailers operating in Colorado, part of Wyoming and part of New Mexico.

The market area in which Associated Grocers operates is dominated by two large chain retailers, Safeway Stores and King Soopers. Together these two large retailers account for in excess of 80 percent of the food retail market in the relevant area. The combined market shares enjoyed by these two large chains has steadily increased in recent years at the expense of independnet grocers such as Associated Grocers of Colorado.

For approximately the last seven weeks 28 Associated stores have employed a Glendinning game of chance promotion known as "Shoppers Spree Bingo". The game has been successful in the sense that the participating stores have enjoyed increased sales and have regained a small part of the business lost to the larger competitors. Because of this favorable experience most of 28 stores wish to extend or renew the game for an additional 13 weeks. In addition, a substantial number of Associated stores which elected not to participate during the initial run of the game now wish to participate during the 13 week extension. Thus the mix of stores would change during the second run with a few of the original stores dropping out and an undetermined number of new stores entering.

During the extension period the prize structure will remain the same, i.e., the odds or chances of winning in each separate prize category will remain the same. Only the market area, the number of participating

stores and the number of prizes in each category will increase depending upon the number of stores which elect to participate.

It is important to realize that this is a scattered market area and not a homogeneous, easily defined metropolitan market. The stores are scattered in various small towns and cities. Apparently each separate area or store places its own advertising but the consuming public is free to play the game at any outlet. Glendinning provides all of the stores with assistance in preparing advertising to make certain that all disclosures mandated by the Commission's trade regulation rule are made.

It is not economically possible to provide a unique and separate game for individual stores. The game materials must be mass produced and mixing must be done on a market-wide basis. Moreover, separate games with different prizes and different termination dates would hopelessly confuse consumers.

It seems apparent that an extension of this game in the manner outlined above would not deceive or confuse consumers. It is also apparent that the extension would be in the public interest in that it would enable this group of relatively small food retailers to better compete with their large, chain competitors. And, conversly, a refusal to permit the Associated stores to engage in this method of competition would adversely affect competition in this market area.

Thus, Glendinning and Associated request a staff opinion advising them that an extension of the game in the manner outlined in this letter would not be considered by the Commission as a violation of its trade regulation rule. Unfortunately, time is of the essence in this matter. Plans must be made immediately for the printing and distribution of game materials. Commitments and orders for materials must be placed within two weeks from today in order to permit the extension to commence when the original game terminates.

Sincerely,

/s/ William W. Rogal

Proposed plan to establish a training and certification program for "moving consultants" and a "code of ethics" for certified "moving consultants" and moving company members of an Institute (File No. 773 7001).

Opinion Letter

April 5, 1977

Dear Mr. Brodsky:

This is in response to your request for advice concerning whether the "organization and activities" of the National Institute of Certified Moving Consultants ("Institute") would be lawful under the statutes administered by this Commission.

The Commission has carefully reviewed the Institute's certificate and articles of incorporation, by-laws, and rules of practice, together with the supporting memorandum and supplementary letters. The proposal about which you seek advice is understood to entail (1) establishment of a training and certification system for "moving consultants" employed by household goods moving companies and (2) administration of a code of ethics for certified consultants and moving company members of the Institute. The program covers "moving consultants" and moving companies engaged in both local and interstate moves. The term "moving consultants" is used by the Institute to refer to the estimator-salesmen employed by moving companies to deal with, and provide price estimates to, prospective customers. *See By-Laws*, Art. II, § 3(A), *as amended*. The Institute asserts that the purpose of the program is to "upgrade and professionalize the competency and integrity of estimators and salesmen employed in the household goods moving and storage industry." *Application* at 14.

The Commission has concluded that it cannot approve the Institute's plan. Your application indicates that, in interstate moves, consumer deception could occur when a moving consultant underestimates the price that will in fact be charged under the carrier's tariff. While sympathetic to this problem, the Commission is nevertheless of the opinion that the proposed estimator training and certification procedures necessarily entail a severe risk that unlawful restraints on price competition will be introduced into areas of commerce not subject to the regulatory jurisdiction of the Interstate Commerce Commission.

Article II, Section 4 of the *By-Laws* states that the Institute will develop and administer programs to train moving estimators with

respect to "moving costs," "industry services at origin and destination," and "best methods of moving and storage." *See also Rules of Procedure*, § 9 and *Application* at 1-3. The emphasis on moving costs is heavy in both the *By-Laws* and the *Application*, and, in context, it is plain that the repeated references to "costs" mean costs to customers (*i.e.*, price), rather than costs to carriers.

Section 3 of the Code of Ethics, as amended, prohibits any Institute member from granting "any rebate either directly, indirectly, or in any form whatsoever, to customers or shippers for services rendered." This section would operate to prohibit the use of rebates in any form to grant price reductions to customers.

The proposal contemplates that failure to comply with the Institute's regulatory requirements could result in the denial of initial certification to estimators, and in the revocation of certification and Institute membership from estimators already certified. Membership could also be stripped from moving companies found to be participating in disfavored conduct.

In light of these elements, the Commission has concluded that approval of the Institute's program is foreclosed because of manifest conflicts with the antitrust laws. The plan will operate, in part, to establish and enforce a common method for calculating price estimates. This can only result in narrowing of the range over which prices for any given job will be quoted. Joint activity among competitors to implement a uniform system for determining price estimates approaches price fixing far too closely to sanction. Further, it is difficult to imagine a more fertile field for outright price collusion than a training program for price estimators run jointly by competing companies. A concerted elimination of price rebates would, of course, also violate the antitrust laws.

The Commission is aware that the Motor Carrier Act of 1935 prohibits household goods movers both from allowing rebates and from deliberately underestimating moving charges. 49 U.S.C. 317(b). The Commission is also aware that, under the Reed-Bullwinkle Act, competing motor carriers may establish uniform rates and obtain ICC approval immunizing those rates from the operation of the antitrust laws. 49 U.S.C. 5b(9). However, both the statutory injunction in Section 317(b) and the statutory exemption in Section 5b(9) apply only to the extent that the Interstate Commerce Commission has jurisdiction over the commerce involved. 49 U.S.C. 302(a), 303(a)(10), 5b(1)(A). In addition, the Institute's program will plainly affect commerce *not* within the

ICC's regulatory ambit as well as commerce within the ICC's jurisdiction. The commerce subject to ICC regulation is not as broad as that susceptible to Federal Trade Commission jurisdiction. *Compare* 15 U.S.C. 45(a)(1), *as amended*, *with* 49 U.S.C. 302(b)(1), 303(b)(8).

Moreover, with respect to the Reed-Bullwinkle Act, Section 5b(6) of that statute limits immunity to *voluntary* price-fixing agreements. In the Commission's view, the Institute's proposal presents ample opportunity for coercive activity designed to force uncooperative competitors into compliance with a uniform rate schedule.

The Commission also notes in passing that the proposal appears to involve other potentially anticompetitive elements undesirable in industry codes of ethics, such as vague standards for refusing and revoking certification, failure to adopt less restrictive alternative methods, and inadequate attempts to minimize opportunities for abuse of the disciplinary processes.

Finally, Section 10 of the Code of Ethics requires that participating estimators hold themselves out to the public as "certified moving consultants." When employees who essentially operate as salesmen (such as do moving estimators) are designated as "consultants," deception may result. Cf. Guide 7(b) for *Private Vocational and Home Study Schools*, 16 C.F.R. 254.7(b).

With respect to the problem of consumer deception caused by underestimation of moving charges, the Commission notes that on August 6, 1976, the Interstate Commerce Commission directed the opening of a proceeding to consider problems associated with moving cost estimation. The ICC's report states that, in light of extreme consumer dissatisfaction with the present cost estimating system, "an exhaustive analysis of existing practice coupled with an intensive review of existing Commission regulations should now be undertaken." Ex Parte No. MC-19 (Sub-No. 23): *Practices of Motor Common Carriers of Household Goods* (Experiment for Improving Accuracy of Estimates—Reentitled—Investigation of Estimating Practices), 125 M.C.C. 307, 316 (1976). Among the question specifically proposed for resolution are the following:

> (e) Should estimators be required to register with this Commission and/or be certified? Should standards be developed to which estimators would be required to conform? Should the methods of training and compensation for estimators be regulated? If so, what methods should be prescribed? What would be the pitfalls of such requirements? *Id.* at 317.

Accordingly, it appears that the ICC will have before it for considera-

tion, *inter alia*, issues respecting consumer deception and possible solutions in the form of certification, performance standards, and training programs for moving estimators.

The Federal Trade Commission, of course, considers in this opinion only so much of your request as may fall within its own jurisdiction.

By direction of the Commission.

Letter of Request

June 17, 1975

Gentlemen:

Enclosed please find original application and five copies for informal advisory opinion upon the validity, under the Federal Trade Commission Act, 15 U.S.C., Sec. 1 *et seq.*, of the organization and activities of the National Institute of Certified Moving Consultants, organized under the General Not for Profit Corporation Act of the State of Illinois.* This application is submitted in accordance with FTC, Procedures and Rules of Practice, Section 1.1.

I would appreciate acknowledgment of the receipt of said application.

Very truly yours,
BRODSKY, LINETT and ALTMAN
/s/ David Brodsky

* The material submitted is not reproduced herein but is available for inspection at Public Reference Branch, Room 130, Federal Trade Commission, Washington, D.C.

Compliance advisory opinions as to whether truck driver training schools have properly determined which of their former students are eligible for partial tuition refunds under a consent order (88 F.T.C. 55, Dkt. 9026).

Opinion Letter

April 8, 1977

Gentlemen:

This is to advise you that the Commission has given consideration to your submission, under cover of your letter of January 26, 1977, of questionnaires which you have sent out pursuant to the order in the above-referenced matter and the determinations you have made with respect thereto regarding eligibility for tuition refund as prescribed by said order. In accordance with said order, you have submitted said questionnaires for review by the Commission and an advisory opinion as prescribed in Section 3.61(d) of the Commission's Rules of Practice.

Except as noted below, the Commission has determined that your submission represents compliance with the applicable order provisions regarding eligibility of former New England Tractor Trailer students for partial tuition refunds.

As a preliminary observation, the Commission has noted that a number of the questionnaires are payable because, under item 6, the former students did not attain employment as tractor trailer drivers after leaving your school, and such students met the other criteria for eligibility contained in the Commission's order.

Several questionnaires, however, were determined by you to be payable even though item 6 was answered in the affirmative, indicating that the former student successfully attained a job as a tractor trailer driver after leaving your school. The Commission's order defines "eligible class member" to comprise those students who *did not* attain the stated employment. Accordingly, the Commission is of the opinion that those questionnaires which contain an affirmative answer to the question in item 6 — Have you ever attained a job as a tractor trailer driver after you left the school? — are not payable.

The Commission has also noted that a second category of questionnaires were determined by you to be payable even though the former students provided information under item 2 showing that they enrolled in your courses either before January 1, 1973 or subsequent to December 31, 1973. The Commission's order defines "eligible class member" as those

students who enrolled during the period of time from January 1 to December 31, 1973 in your tractor trailer courses. Accordingly, the Commission is of the opinion that under the terms of its order, students who do not meet this requirement are not eligible for partial refunds of tuition. Also, the Commission is of the opinion that your determination of date of enrollment should not be based exclusively on a student's response to item 2 of the questionnaire but should take into account documentation submitted with the questionnaire, or otherwise in your possession, reflecting the actual date of enrollment.

It is the opinion of the Commission, based upon the information furnished that with the two exceptions noted hereinabove, your eligibility determinations under Part III, paragraph 5 of the Commission's order represent compliance with that provision to the extent that your obligations under other order provisions have been fulfilled. This opinion is not intended to apply to any other duties or obligations imposed upon you by the order other than your responsibility under Part III to make initial determinations as to who constitutes eligible class members for purposes of the required tuition refunds.

Chairman Collier continues to object to the rules which govern eligibility for refunds in this case and which are the subject of this request for advice.

The student questionnaires are being returned to you under separate cover.

By direction of the Commission.

Letter of Request

January 26, 1977

Dear Mr. LaDue:

We are submitting the enclosed questionnaires* in accordance with docket #9026. These questionnaires are separated as to the Corporations and are also in alphabetical order.

After careful review of the 567 questionnaires, 1 of which is a duplication, it is our opinion that every 1973 enrollee who answered the questionnaire is eligible for refund.

Please return the questionnaires, along with your comments, timely, so

* Not reproduced herein.

that we may issue checks in accordance with rules and regulations of docket #9026.

Sincerely,

New England Tractor Trailer
Training of Connecticut, Inc.

/s/
Arlan Greenberg
President

P.S.
Please note that any address changes were recorded on the bottom of the questionnaire, therefore the questionnaires are needed for mailing out refunds.

Trade Regulation Rule on Preservation of Consumers' Claims and Defenses, 16 C.F.R. 433, does not create new rights for the consumer against the seller but merely preserves claims and defenses a consumer may assert against a seller so that he may raise them against the holder of the contract when the contract is negotiated or transferred (File No. 773 7007).

Opinion Letter

April 6, 1977

Dear Mr. Ambrose:

This is in response to your letters of January 28, March 17 and May 12, 1976, concerning the Trade Regulation Rule on Preservation of Consumers' Claims and Defenses, 16 C.F.R. 433. Specifically, you request: (1) that the rule be repealed or amended to conform to the Commission's authority; and (2) an advisory opinion as to whether the rule confers any rights on consumers to withhold payment either from the original holder of a consumer credit contract or from a subsequent holder of the contract.

In considering the rule the Commission provided a substantial opportunity for interested parties to file written data, views and arguments. In addition ample opportunity was provided for interested parties to testify at public hearings. A history of the rulemaking proceeding appears at 40 F.R. 53506 (1975). The rule was promulgated pursuant to and in accordance with Section 6(g) of the Federal Trade Commission Act, Sec. 202(c) of the Federal Trade Commission Improvement Act (Pub. Law 93-637) and all other applicable law. A legally sufficient Statement of Basis and Purpose for the rule was published with the rule. *See* 40 F.R. 53506 - 53529 (1975). Your requests for repeal or amendment of the rule are accordingly denied.

The Trade Regulation Rule, in pertinent part, provides that it is an unfair or deceptive practice for a seller, directly or indirectly, to take or receive a consumer credit contract which fails to provide a notice, as specified, that holders of the contract are subject to all claims and defenses which the debtor (consumer) could assert against the seller.

The rule does not create new rights for the consumer against the seller. Claims and defenses of a consumer, assertable against a seller under state law, remain unchanged under the rule. When a consumer contract is negotiated or transferred, the rule, through the required contract notice, merely preserves the claims and defenses a consumer may assert

against a seller so that he may raise them against the holder of the contract. Accordingly, if the consumer, under applicable law, is entitled to withhold payment from the seller, he may, pursuant to the notice, withhold payment from the holder.

By direction of the Commission.

Third Letter of Request

May 12, 1976

Dear Mr. Tobin:

Thank you for your telephone call on May 10, 1976 to notify me of the decision to deny the ICCA's petition for repeal of its trade regulation rule on preservation of consumers' claims and defenses. We appreciate that thoughtful effort.

Today I received your lengthy letter of the same date, which misidentified the International Consumer Credit Association as the International Consumer Finance Association. Presuming that this error arose from pressure of time in preparation of the letter rather than actual confusion between our organization and the National Consumer Finance Association, I and the ICCA's legal counsel are concerned because your letter states that the Commission considered only one letter from the ICCA and only one petition among several under Section 553(e) of the Administrative Procedure Act.

Although your letter of May 10 explains reasons for denial of those petitions filed by other associations it names, it does not seem to address itself to any of our petitions. Since we do not regard it as complying with the requirements of Section 555(e) of the Administrative Procedure Act, we hope that you will agree that we have a legitimate concern regarding whether our petitions have received due process of law and that you will therefore act promptly to relieve that concern.

My letter of January 28, 1976 to Acting Chairman Dixon requested a Commission interpretation of its trade regulation rule on preservation of consumers' claims and defenses. Failure of the Commission to respond to that petition led to a second petition on March 3, 1974, addressed to Mr. Christofer W. Keller, urging repeal of or amendment of the trade regulation rule on grounds of denial of due process of law for this and other stated reasons.

As a result of receipt of Ms. Dewey's letter of March 3, 1976, I wrote

again to Acting Chairman Dixon on March 17, 1976. That letter again protested denial of due process of law, and it certainly should have been considered by the Commission in connection with both of the earlier petitions, not only because of bearing on the earlier petitions, but because that letter closed with a request for postponement of the effective date by the Commission until it had acted on our other petitions, which we regarded at that time and now as essential in affording us due process of law. Consequently, our request for postponement is quite different from those petitions for postponement filed by other trade associations.

We believe that your letter of May 10, 1976 did not provide reasons for denial of our petition for repeal or postponement and did not address itself at all to our petitions for interpretation and amendment of the rule.

Section 555(e) of the Administrative Procedure Act states: "prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

This letter is not intended as an appeal with regard to any denial of our petitions, but rather to seek clarification of the status of the following petitions and a brief statement of the grounds for denial of any that have been denied by the Commission with identification of the date of Commission action:

1) Our petition for interpretation by the Commission of whether this trade regulation rule is intended to confer any right on the consumer to withhold payment either from an original creditor or any subsequent holder in due course. We have been informed that the Commission's general counsel is preparing an advisory opinion in response to this petition. We are compelled to comment that delay in the issuance of an interpretation of a rule promulgated so many months ago should not be occurring if the Commission and its staff understand their own rule, the purposes for which it was issued, and its probable legal effects.

2) Our petition for repeal of the trade regulation rule on grounds of lack of statutory authority to issue it, especially since it is intended to abrogate and/or pre-empt the laws of most if not all states.

3) Our petition for amendment of the rule to conform to the Commission's authority to prevent unfair and deceptive acts or

practices, to conform to the requirement of the Magnuson/Moss Act relating to specificity of prohibited acts or practices and to conform to a requirement that the rule include a statement of findings and purpose as required by law. This petition alleged that the Commission has no authority to preserve consumer claims and defenses, per se, nor to issue a trade regulation rule for such a purpose.

4) Our petition for postponement of the effective date of the trade regulation rule was conditioned only on the need of the Commission itself for time to adequately consider and respond to the above three petitions.

This and other correspondence which I have transmitted to the Commission and its staff was written to meet the responsibilities of the Board of Directors of the International Consumer Credit Association to nearly 45,000 American members. May I have an early reply so that I can provide an accurate report of the Commission's actions on our petitions as soon as possible. Thanks for your cooperation.

Sincerely yours,

/s/ JAMES A. AMBROSE
Secretary-Treasurer

Second Letter of Request

March 17, 1976

Dear Mr. Dixon:

On January 28, 1976, I wrote to you on behalf of the International Consumer Credit Association to formally request interpretation by the Commission of its trade regulation rule on preservation of consumers' claims and defenses. The purpose of that letter was to raise and hopefully settle at least one question of constitutionality as part of the official record of the proceedings.

Failing to receive anything but a form letter acknowledgment of this request by March 3, 1976 from Mr. Christofer W. Keller, presiding officer for the proceedings on this rule, I wrote on that date to Mr. Keller to petition the Commission under Section 553(e) of the Administrative Procedure Act, a part of the Commission's statutory authority for promulgation of its rule on consumers' claims and defenses. In response, as of this date, we have received another fill-in form letter from Mr. Keller identical to the acknowledgment of my letter of January 28.

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Attached is a copy of a letter dated March 3, 1976, which I received on March 8, 1976 from Anne E. Dewey, Division of Special Projects, apparently as a result of improper referral to her for a reply.* We asked for an interpretation from the Commission itself, which would be binding thereafter not only on the Commission but on the federal courts as well. We did not ask for an informal staff opinion, which has no legal standing of any kind.

Under due process of law, our request required either its denial by the Commission itself or issuance of an interpretation by the Commission itself. We recognize that the Commission had an option, but also a duty either to deny our request or to respond to it affirmatively through issuance of an interpretation. Unless the referral of my letter to Ms. Dewey was inadvertent, that referral was denial of due process of law, because the Commission did not have the option of a staff opinion letter.

Despite that fact, I am compelled to comment in respect to several statements in Ms. Dewey's letter. A copy of that letter is attached for your convenience.*

Any present or even past authority which the Commission has in promulgating trade regulation rules is limited to prevention or prohibition of specific unfair and deceptive acts or practices in or affecting commerce. Any act or practice covered by a trade regulation rule must in fact be unfair and deceptive in all instances. Rules promulgated under P.L. 93-637 may include requirements, but only as corollaries to stated provisions of such rules which prohibit specific acts or practices. The Commission has no authority to legislate generally, nor to pre-empt or repeal or annul either statutory or common (decisional) laws of the states. If the Commission does not agree with that view of its authority, I will appreciate information on its interpretation of P.L. 93-637 and/or the Federal Trade Commission Act.

The second paragraph of Ms. Dewey's letter specifically states that it is the intention of the trade regulation rule on consumers' claims and defenses to repeal the holder-in-due-course doctrine. She specifically used the legal term "abrogate," which means to annul by an authoritative act, to abolish or to repeal, revoke or cancel. The Commission has no such authority.

Ms. Dewey states that it is the intention of this rule to abrogate the

* Not reproduced herein.

doctrine which permits the separation of the duty to pay from the duty to perform in the context of consumer credit transactions. Neither this rule nor any other promulgated by the Commission has declared that failure in performance by a seller is an unfair or deceptive act or practice. Further, the promulgated rule would make a holder in due course liable for any claim or defense which a consumer could assert against a seller, even when the seller has not been involved in any unfair or deceptive act or practice, fraud or any other form of misconduct. Consequently, the rule sets a requirement which is not a corollary of any prohibition, other than the taking or receiving of a contract which does not meet that requirement.

Ms. Dewey's letter, in its third paragraph states, quite incorrectly, that the rule permits a consumer to withhold payment from a subsequent holder of his contract if state law grants him the right to withhold payment in that situation from his immediate seller. It is clearly the intention of the Commission through promulgation of this rule to abrogate, as Ms. Dewey stated, the holder-in-due-course doctrine, which gives a third party holder immunity from all claims and defenses which a consumer may have against a seller. The rule even abrogates or pre-empts the laws of those states which have either abridged or outlawed the holder-in-due-course doctrine as codified in the Uniform Commercial Code.

If it is the intention of the Commission to merely preserve consumers' claims and defenses, then it can do so by amending its rule to prohibit the inclusion in credit contracts or agreements of any provisions which would grant immunity to any holder in due course from any claim or defense which the buyer may assert, either affirmatively or defensively, against a seller under state laws. But even if the Commission would amend its rule in this fashion, it would still lack statutory authority of any kind to promulgate the rule because it would not serve to prohibit any specific unfair or deceptive act or practice. The consumer problems which the Commission intends to resolve or alleviate through this rule are problems which cannot be properly handled through rulemaking, but which the Commission can appropriately handle on a case by case basis where its acts against a seller for unfair or deceptive acts or practices, such as in the case of Main Street Furniture, Inc., FTC Docket No. 2772, announced on January 28, 1976.

Ms. Dewey's letter asserts that the Commission has both a duty and authority to enforce state statutes and decisional law through promulgation of a rule which is intended to preserve consumer rights and remedies established under such laws. We disagree, and our position is

supported by that of the National Association of Attorneys General, as expressed in two resolutions it adopted at its recent Mid-Term Meeting in Scottsdale, Arizona, and transmitted to Congress.

However, the Federal Trade Commission does have a duty to taxpayers to use the funds appropriated by Congress in proper exercise of its duties and responsibilities under federal laws, one of which is to uphold and defend the Constitution of the United States as the supreme law of the land and therefore involves supreme duties and responsibilities. It was in recognition of this that the International Consumer Credit Association has asked the Commission for a formal interpretation of its trade regulation rule, and why the Association has subsequently petitioned the Commission for amendment or repeal of its rule.

Consequently, we will appreciate early formal action by the Commission on both our request for an interpretation and our petition for amendment or repeal. If the Commission cannot take quick action in either instance, then we also request a postponement in the effective date of its trade regulation rule beyond May 14, 1976, until such time as the Commission will have acted.

Sincerely yours,

/s/ JAMES A. AMBROSE
Secretary-Treasurer

First Letter of Request

January 28, 1976

Dear Mr. Dixon:

On January 26, 1971, the Federal Trade Commission proposed a trade regulation rule on preservation of consumers' claims and defenses, which it promulgated on November 14, 1975 to become effective on May 14, 1976. Because of a recent press release sent out by Rep. Frank Annunzio (D-Ill.), chairman of the House Subcommittee on Consumer Affairs, the International Consumer Credit Association requests interpretation of this trade regulation rule before its effective date to clarify whether or not it confers any right on consumers to withhold payment from either any original creditor or subsequent holder in due course.

When the Commission announced this proposed trade regulation rule, the ICCA filed a strong protest with both the Commission and Congress on grounds that such a trade regulation rule would be unlawful and

unconstitutional exercise of legislative powers, particularly because it would pre-empt both the Uniform Commercial Code and other statutes carefully considered by the legislatures of the various states. It was and continues to be our view that, if federal intervention is necessary in the law of contracts, only Congress (and not the FTC) has authority to legislate. It is our view that promulgation of this trade regulation rule by the Commission is a violation of the Civil Rights Act of 1964 per se.

Our Association has not taken a position with regard to any proposal at the state level of government to either outlaw or abridge the so-called holder-in-due-course doctrine. These proposals have been constitutional exercise of the police powers and duties of the states, and not efforts to reallocate losses arising from misconduct by sellers to ultimate creditors and thus to consumers in general. If any such laws confer on a consumer the legal right to withhold payment either to the original holder of a credit contract, agreement or note or to a holder in due course, we do not interpret them in such a manner.

However, in his press release on January 8, Congressman Annunzio indicated that the Commission's trade regulation rule will confer such a right. If that is a correct interpretation of the rule, a new question of constitutionality with regard to this rule emerges—one where there are related court decisions.

In recent years, many courts and the U.S. Supreme Court have given a great deal of cognizance to the need for hearings and due process of law in connection with replevins, garnishments and other activities of creditors conducted "under color of law." Replevins and garnishments have been declared unconstitutional for lack of hearings and due process of law. The Commission should be aware of such decisions and the basis for them. But it should be also aware that, unless the Supreme Court ultimately decides otherwise, so-called "self-help" repossession has been regarded by a number of state and federal courts as constitutional because the property was not taken by the creditor under color of law. We do not believe that the courts will deny creditors the same rights as consumers.

When a consumer buys goods or service from a retailer who remains the creditor, he does not exercise any right under color of law if he refuses to pay this creditor in the event of dissatisfaction arising from the purchase. Consumers frequently do this in disputes with retailer creditors where there is no element of deceit, dishonesty, fraud or misconduct on the part of the retailer. They do it in connection with simple disputes. But when they do it, they do so at their own risk. It

gives them an unfair leverage in having a dispute resolved in their favor. The retailer will often give them their way even when his cause is just, because the cost will be less than the nuisance and cost of resolving the dispute in court.

We disagree with the Commission's view that the common law holder-in-due-course doctrine arose solely in commercial credit and has no application in consumer credit transactions. To have immunity from buyers' claims and defenses, a holder in due course under the doctrine had to be dealing "at arm's length." It did not include the commercial situations leading to the abuses which the Commission is attempting to correct until the doctrine was codified and corrupted through the Uniform Commercial Code, which grants immunity if the third party financing source is merely "dealing in good faith." We made that point unsuccessfully with the National Conference of Commissioners on Uniform State Laws through correspondence before the Commission proposed its rule.

Section 5 of the FTC Act authorizes the Commission to prevent unfair and deceptive acts and practices in commerce. The Commission proposed its trade regulation rule on preservation of consumers' claims and defenses under that authority. If the Commission's proposal or even the much simplier and briefer one it finally adopted were limited to situations involving fraud, deceit, deception or any other clear form of misconduct by sellers, its authority and the constitutionality of the rule would hardly be in question. But the final rule more frequently will apply to simple, uncomplicated disputes between buyers and sellers involving a third party financing source, who sometimes will be as powerless as either of the other two parties to equitably resolve the dispute. Further, the rule will apply to many situations in which the seller is a totally innocent party and there is misconduct on the part of the buyer.

The brief rule published on page 53506 of the issue of the *Federal Register* for November 18, 1975 places a clear duty on sellers. It is limited to giving a prescribed notice. But the rule is totally moot on the rights of buyers arising "under color" of this law. And the effect of the rule on creditors, as that term is defined in the rule, is indefinite. The term "creditor" includes both retailer creditors and third party financing sources, such as banks and time sales finance companies. The required notice states "any holder," so it would seem to apply to any retail credit contract, not just those that will be sold to third parties. So the question of how "creditors" may violate this rule and thus become

subject to FTC action is open to a great deal of both uncertainty and speculation.

In his press release, Congressman Annunzio said that this rule will hurt only disreputable businesses. That does not appear to be the case.

When a consumer buys goods or services from a retailer on credit and the retailer remains the creditor, the consumer may withhold payment to exercise his rights and remedies. His situation is analogous to that of a creditor who engages in self-help repossession, except for one factor. The consumer exercises his rights and remedies at his own risk, and he may not be aware of the extent of that risk.

The Commission's rule will apply to retail sellers who remain as creditors and to those who transfer their contracts to third parties. It will also apply to those third parties and to consumers. The required notice states: "Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof. Recovery hereunder shall not exceed amounts paid by the debtor hereunder."

Any holder, including a retailer seller, is prohibited under the rule from taking or receiving, etc., any contract which does not bear this notice. The exception is retail sellers who remain creditors as credit card issuers.

The rule purports to preserve consumers' claims and defenses, but whether or not the seller continues to be a holder, the rule appears to cut off or limit claims of any type, such as damages, because the notice also says: "Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder." Thus, the rule could result in graver injury to consumers than the abuses it seeks to correct.

If the rule confers a right on the consumer to withhold payment to a creditor and that right is exercised, the exercise is "under color of law." The creditor is deprived of money or other property without a hearing and due process of law. The creditor would be denied constitutional rights in a situation which is analogous to Fuentes v. Shevin, in which the U.S. Supreme Court outlawed replevin statutes of many states. This denial would result solely from the Commission's rule, in conflict with the Civil Rights Act of 1964.

Consequently, we urge the Commission to interpret its own trade regulation rule before it becomes effective to determine whether or not

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it is intended to confer a right to withhold payment and, if so, under what circumstances.

Through the Fair Credit Billing Act, Congress has exerted its authority to regulate holder in due course matters relating to credit cards. In this, it exercised authority to pre-empt state laws. That authority has not been challenged to date. Perhaps the Commission should reconsider its position regarding issuance of a trade regulation rule on preservation of consumers' claims and defenses by referring the matter to Congress for appropriate legislation. None of the Commission's efforts would be wasted if Congress would accept such a recommendation.

Sincerely yours,

/s/ JAMES A. AMBROSE
Secretary-Treasurer

233-738 O - 77 - 44

Obtaining only the signature of the insured party on personal insurance form when personal insurance is selected or the signature of either co-maker if personal insurance is declined constitutes compliance with the requirements of the order to cease and desist (82 F.T.C. 1841, Dkt. C-2420).

Opinion Letter

May 6, 1977

Dear Sirs:

The Commission is in receipt of the communications from your counsel, James H. Rowe, Esquire, dated December 23, 1976, and January 21, 1977, with attached exhibits, which you have filed as a supplemental report showing the manner and form of your compliance with the order to cease and desist issued on June 26, 1973, in the above case.

The Commission has reviewed the supplemental report of compliance and has concluded, on the assumption that the information submitted is accurate and complete, that no compliance action by the Commission is indicated at this time. The Commission will not be precluded, however, from instituting appropriate action should it subsequently appear that such information is inaccurate or incomplete. In addition, the Commission may at any time reconsider, revoke, or rescind such determination should it subsequently appear that such information is inaccurate or incomplete, or if action had been taken in violation of the terms of the order.

In his letter of January 21, 1977, Mr. Rowe contends that the notification he made in that letter of Commercial Credit Company's acquisition of Great Western Loan & Trust Company and its subsidiary, Great Western Finance Company, does not appear to be required by the Commission's order since these companies require the purchase of credit insurance and, as required by law, therefore include the credit insurance premiums in the amount of the finance charge in consumer loans. The Commission wants to make it clear that the notification was required by the order. First, the provisions of the order are not limited to requirements concerning the inclusion or non-inclusion of credit insurance premiums in the amount of the finance charge. Paragraphs 3 through 6 of the order impose additional requirements in connection with the granting of consumer loans. Secondly, a policy of an acquired subsidiary to require credit insurance does not remove the acquisition from the notification requirement of the order since the acquisition of a corporation engaged in the making of consumer loans and the sale of

credit insurance may affect compliance obligations under any provision of the order.

By direction of the Commission.

Supplemental Letter Relative to Request

January 21, 1977

Dear Mr. Howerton:

Please note the penultimate paragraph of the Consent Order in the above-entitled proceeding which reads in full:

> IT IS FURTHER ORDERED that respondent notify the Commission within thirty (30) days of any change in the corporate respondent which may affect compliance obligations with regard to the extension of consumer loans arising out of this order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation with regard to the extension of consumer loans which may affect compliance obligations arising out of this order.

As of January 1, 1977, Commercial Credit Company acquired a new subsidiary, Great Western Loan & Trust Company, 1000 North Alamo, San Antonio, Texas. The new subsidiary, and one of its subsidiaries, Great Western Finance Company, at the same address, engage in the making of consumer loans and the sale of credit insurance.

However, as permitted by Texas law, credit insurance is *compulsory* for the consumer loans made, and all credit insurance charges *are included* in the finance charge. Hence, notification to the Commission of the foregoing acquisition does not appear to be required. Notification is required of only such corporate changes "which may affect compliance obligations with regard to the extension of consumer loans *arising out of this order.*" (Emphasis supplied). The Consent Order itself, and accompanying complaint are concerned with the *non-inclusion* in finance charges of credit insurance on consumer loans.

Nevertheless, the Commission is welcome to this advice of the new acquisition.

Sincerely,

/s/ James H. Rowe, Jr.

Counsel for Commercial Credit Company

Letter of Request

December 23, 1976

Dear Sirs:

Enclosed, as requested, are two tables showing penetration rates on credit life and credit accident and health for October 1976, the latest month for which such rates are available.* In Arkansas which is listed on both tables as "0," the Company does no business. Eleven states are left blank on the table for credit accident and health because the Company does not offer credit accident and health in those states.

As I understand it from our conference, you will now submit to the Commission the question of whether, under the Consent Order, the Personal Insurance Authorization form must be presented for the signatures of both husband and wife where both are to be obligated for a consumer loan but only one of them is to be insured, and you will recommend that only presentation to, and the signature of the spouse to be insured is required.

Your courtesy and consideration are much appreciated.

Greetings of the Season to you.

Sincerely,

/s/ James H. Rowe, Jr.

* Not reproduced herein.

When needed pharmaceuticals are unavailable or difficult to obtain, non-profit hospital may resell the needed pharmaceuticals to the general public as humanitarian gesture during emergency caused by medicaid strike (File No. 773 7009).

Opinion Letter

May 27, 1977

Dear Mr. Iseman:

This is in response to your letter of December 20, 1976, requesting advice concerning the exemption to the Robinson-Patman Act found in the Non-Profit Institutions Act, 52 Stat. 446, 15 U.S.C. 13c.

The Commission understands that your client, St. Peter's Hospital of the City of Albany, is a not-for-profit corporation currently receiving preferential price treatment in its purchases of pharmaceuticals as permitted by the above-cited exemption of the Robinson-Patman Act; that your client would like to resell pharmaceuticals, at cost, to a neighboring, not-for-profit nursing home which currently purchases its drug needs at retail from local druggists; and that your client would like to resell pharmaceuticals to the general public during the medicaid strike, should pharmaceuticals become otherwise difficult or impossible to obtain. You seek advice on whether such resales are permissible under the Robinson-Patman Act.

The Non-Profit Institutions Act exempts from the Robinson-Patman Act "purchases of their supplies for their own use by * * * hospitals, and charitable institutions not operated for profit." The Supreme Court in *Abbott Laboratories* v. *Portland Retail Druggists Ass'n. Inc.*, 426 U.S. 1 (1976), held that the phrase "for their own use" limited the classes of individuals to whom the supplies could be resold. However, the Commission does not believe these limitations were intended to apply to resales of supplies, at cost, by one charitable institution to another that are limited, in turn, to the latter charitable institution's own use. A resale of this nature would constitute a not-for-profit transfer of supplies from one institution, eligible under the exemption, to another such institution, also eligible under the exemption. In the Commission's view, the exemption was intended to insulate from Robinson-Patman application all purchases of supplies (for their own use) by the designated classes of institutions not operated for profit. The transactions, as above described, would not appear in conflict with such a purpose. The Commission, accordingly, would regard the resale, at cost, of pharmaceuticals by your client to the nursing home as not altering

its exempt status under the Non-Profit Institutions Act. Such pharmaceuticals must be acquired for the nursing home's "own use" as that language was interpreted in *Abbott Laboratories, supra,* for the exemption to apply.

The question of whether a non-profit hospital such as your client may open its pharmacy to the general public in an emergency situation was addressed specifically by the Supreme Court in the *Abbott Laboratories* case. We direct your attention to that portion of the decision which states that:

> [W]hen the hospital pharmacy is the only one available in the community to meet a particular emergency situation [,] * * * [s]o long as the hospital pharmacy holds [that] situation within bounds, and entertains it only as a humanitarian gesture, we shall not condemn the hospital and its suppliers to a Robinson-Patman violation * * *. [*Id.* at 18.]

Accordingly, the Commission is of the opinion that if needed pharmaceuticals are not available or difficult to obtain, your client may resell the needed pharmaceuticals to the general public as a humanitarian gesture during the emergency caused by the medicaid strike.

By direction of the Commission.

Letter of Request

December 20, 1976

Dear Sir:

I represent St. Peter's Hospital of the City of Albany, (hereinafter the Hospital), a not-for-profit corporation organized and existing under the Not-for-Profit Corporation Law of the State of New York. Pursuant to 16 C.F.R. §1.1 *et seq.*, I am hereby requesting an advisory opinion from the Commissioner with regard to the following proposed sales of pharmaceuticals by the Hospital. I certify that the proposed courses of action herein described have not been and are not now being followed by the Hospital and upon information and belief, they are not the subject of a pending investigation or other proceeding by the Commission or any other governmental agency.

The Hospital operates its own pharmacy, and as a not-for-profit entity it enjoys the preferred price treatment permitted to such organizations by virtue of the non-profit institution exception to the Robinson-Patman Act. 15 USC §13c.

Geographically adjacent to the Hospital is the Villa Mary Immaculate

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Nursing Home (hereinafter the Nursing Home) which is also a not-for-profit corporation. The Hospital and the Nursing Home are completely separate corporate entities, but both are sponsored and controlled by different Orders of Religious Women under the canonical jurisdiction of the Bishop of the Roman Catholic Diocese of Albany. In this regard, the Hospital is sponsored by the Religious Sisters of Mercy, Albany, and the Nursing Home is sponsored by the Sisters of Allegheny.

The Hospital would like to sell its pharmaceuticals to the Nursing Home for the same reduced cost that the Hospital receives from its supplier. The Nursing Home does not have its own pharmacy and it is currently being supplied by local retail druggists. Is this a permissible sale under the not-for-profit exemption contained in the Robinson-Patman Act? If it is not a sale deemed to be for the Hospital's "own use," can it be justified on the grounds that the Nursing Home would itself be entitled to the preferential price treatment if it elected to operate its own pharmacy?

The second question concerning which I am seeking guidance relates to the impact of a medicaid strike being conducted by certain retail pharmacies in New York State. If needed pharmaceuticals are not available or difficult to obtain because of such a strike, is it permissible for the Hospital to sell these items to the general public?

Very truly yours,
DeGRAFF, FOY, CONWAY and
HOLT-HARRIS

/s/ Robert H. Iseman

General audience film featuring, in the period-setting of contemporaneous news events, selections from the first 25 years of television commercials (File No. 773 7012).

Opinion Letter

May 27, 1977

Dear Mr. Sweda:

This is in response to your request for advice concerning production by your company of a general audience film to feature, in the period-setting of contemporaneous news events, selections from the first 25 years of television commercials.

The selections, as your request appears to presuppose, might include television ads involving advertising methods or representations against which, in the course of corrective enforcement actions, the Commission has issued inhibiting orders (*e.g.*, order proscriptions involving the use of deceptive mock-ups, misleading demonstrations, camera tricks that magnify, minimize or distort, cigarette advertising not appropriately disclosing the prescribed health warning, or the like).

Your request, in substance, seeks pre-clearance from the Commission for use of any such television commercials in the context of the proposed film. You have reported that no sponsoring relationship exists between the film and any product or service supplier whose past television commercials may be subject to selection for the film.

The Commission desires to assure you that, as to matters within its jurisdiction, it has no objection to the proposed feature film project. Please be advised, however, that this Commission assumes no position respecting possible applicability of any laws or regulations not within its enforcement authority.

Because the Commission may have taken enforcement action against and prohibited some of the advertisements which will be included in your feature film, the Commission hopes that you will consider including in the film a short, general disclosure to that effect.

By direction of the Commission.

Supplemental Letter Relative to Request

April 4, 1977

Dear Mr. Garvey:

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This letter is to confirm our telephone conversation of 31 March, 1977 regarding our request for the use of old television commercials in a feature film project.

1. The feature film project described in our request of 3 March, 1977 is for national and international distribution to movie theatres.

2. As producer of the film project, I alone am the final judge of what films and commercials will be used.

3. The investor, whether private or corporate, will have no creative control of the film, except to the extent of judging what film should *not* be used in the project on the basis of objectionability to the financial success of the film.

4. The primary and singular aim of the project is as a film of entertainment and documentation of the world of the T.V. commercial. In no way is the project to be used as an advertising vehicle for an investor.

5. There will be no intentional use of misleading ads in the film project. I am considering a section from the 90-minute length to show the glaring deception practiced by some unscrupulous advertisers.

May I again stress the urgency for an early ruling as I want to release the film sometime in December of this year. As we cannot begin to work even on the selection of 100-200 commercials from the more than 200,000 commercials in existence, I think you can understand my need for expediency.

Sincerely,

/s/ F. Wendell Sweda
President

Letter of Request

March 3, 1977

Dear Mr. Secretary;

Subject: Request for an advisory opinion ruling.

Petitioner: SSE Communications

Re: Feature film project, tentatively titled, "And Now A Word From Our Sponsor* * *."

We at SSE Communications are working on a feature film project for national theatre distribution. We are putting together the best of the first 25 years of the American television commercial. Cooperating with us in this project are the Museum of Modern Art and the Screen Actors' Guild.

Television commercials represent a cross-section of the entire lifestyle of our generation. They epitomize the tastes, jobs, personal identities, conveniences, entertainment, leisure, desires and fantasies which reflect this television age.

The film is best described as a compilation of some of the best television commercials put together as an entertainment vehicle. It will be a General Audience feature production.

From nearly 200,000 commercials to choose, approximately 100 of the best will be included. Many are regarded as classics for their techniques, approach, interpretation, and reflection of our times. They are classics in entertaining the viewer.

We plan to use noteworthy filmed news events, i.e., the first space shot, Kruschev using his shoe at the U.N., etc., to re-orient the viewer to the various time periods within the 25-year history.

Because the Film Department of the Museum of Modern Art classifies the television commercial as an art form unto itself with genuine artistic and historic merit, we are donating a percentage of the gross to the Museum's Film Archives Department for the further preservation of films. We are also donating an equal percentage of the film's gross to the Screen Actors' Guild for a special fund for old actors' homes in New Jersey and California.

Therefore, SSE Communications respectfully requests an affirmative ruling to the use of old television commercials (including those, because of their age, that no longer conform to current F.T.C. regulations) for this specific project.

Sincerely,

/s/ F. Wendell Sweda
President

Proposed advertising and sale of information concerning the Taxpayers' Service of the Internal Revenue Service (File No. 773 7011).

Opinion Letter

June 9, 1977

Dear Mr. Chasnoff:

This letter is in response to your request for an advisory opinion on behalf of your client, Information Foundation, Inc., concerning the proposed use of submitted advertising copy. For a fee, your client anticipates sending to persons responding to the proposed advertisement information about the Internal Revenue's Taxpayers' Service, including services available under that governmental program, and advice about how to use that program effectively.

Because, in the Commission's view, the advertisement has the capacity to mislead the public into believing that your client itself is offering to provide, for the $5 fee listed, both tax advice and tax preparation services, the Commission cannot approve the advertisement in its present form. With appropriate changes, however, the Commission believes your marketing proposal would comply with laws it administers. Please be advised that the Commission has not reviewed, and therefore does not endorse, the accuracy of any of the technical information and advice your client proposes to send to consumers.

By direction of the Commission.

Letter of Request

February 8, 1977

Gentlemen:

This office represents Information Foundation, Inc. which has requested that I obtain from you an advisory opinion respecting the advertisement they will be placing in various printed media, including newspapers, magazines, journals, and printed flyers. Also enclosed, in addition to the advertisement, is the printed material they will be forwarding to persons responding to the advertisements.*

It would be appreciated if you would submit an advisory opinion to me respecting the legality of the advertisement in accordance with Federal

* Not reproduced herein.

Trade Commission rules and regulations. I shall be happy to be of any assistance to you should you desire additional information.

Sincerely,

/s/ Joel Chasnoff

PROPOSED ADVERTISEMENT

GET TAX ADVICE AND YOUR FEDERAL RETURN PREPARED FREE BY EXPERTS. FOR DETAILS ABOUT THIS LITTLE-KNOWN U.S. GOVERNMENT PROGRAM, SEND $5.00 TO INFORMATION FOUNDATION, INC., P.O. BOX 246, BURTONSVILLE, MARYLAND 20904.

Compliance advisory opinion that proposed use of a "Confidential Dealer Cost List" would not violate Commission order (88 F.T.C. 24, Dkt. C-2828).

Opinion Letter

June 17, 1977

Dear Mr. Schwab:

The Commission has considered the request for advice as to whether United Audio Products, Inc. (United) may engage in a proposed course of action, whereby United would issue a "Confidential Dealer Cost List," without violating the order issued by the Commission on July 12, 1976, in the captioned matter.

The proposed "Confidential Dealer Cost List" would have a cover sheet notifying the retail dealer that United does not maintain any fair trade programs, prices are for informational purposes only, the approximate nationally advertised values are for informational purposes only, all retail dealers are free to set their own resale prices, no employee or representative has authority to advise or suggest to a retail dealer any resale price, no favorable or unfavorable treatment will be given to a dealer based on his selection of a resale price, and United does not intend to sanction any deceptive practices.

The proposed cost list is a multi-column list containing a column for item description, item cost to the retail dealer, gross margin price columns ranging from 15 percent to 45 percent which reflect the price a retail dealer would charge to obtain a specific gross margin on the sale of United's products, an "Approximate Nationally Advertised Value" column, and a blank "Your Price" column.

On the basis of the facts submitted, you are advised that the Commission is of the opinion that the proposed use of the "Confidential Dealer Cost List" would not violate Commission order No. C-2828.

By direction of the Commission.

Second Supplemental Letter Relative to Request

May 9, 1977

Gentlemen:

Responding to your letter of May 3, 1977, we would advise as follows:

United Audio Products, Inc. is about to introduce a completely new product line of record players which will be launched in June and will be nationally advertised in the manner as shown on the enclosed advertisement.*

It is therefore essential that we have prepared a dealer price list such as we submitted to you which is in every respect similar in form to dealer price lists used by competitors with your knowledge and approval.

The approximate nationally advertised value is predicated upon the comparative values of similar products in the market place consistent with the cost thereof to the dealer. The dealer has the unrestricted right to fix his own margin of profit and selling price.

We do trust to receive a response as soon as possible since we must have our dealer price list ready for distribution by June 1, 1977.

Very respectfully yours,
UNITED AUDIO PRODUCTS, INC.

/s/ By

Rudolph Taplitz

First Supplemental Letter Relative to Request

April 25, 1977

Gentlemen:

United Audio Products, Inc., the marketer of Dual Audio Products, which is operating under the Federal Trade Commission Consent Order of July 12th, 1976, finds itself under a distinct competitive disadvantage in refraining from communicating to its dealers the nationally advertised values of its products, a practice indulged in by all its competitors, including those operating under an identical F.T.C. Order.

The practice is not intended to suggest or dictate to the dealer the resale prices of the products as is indicated in the cost sheet of the enclosed proposed notice to dealers, but is intended to show the comparative value of Dual products in the marketplace.

* Not reproduced herein.

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The enclosed form of cost list* is identical with that authorized by the F.T.C. in the case of competitive products operating under similar F.T.C. consent orders and it is submitted that we, in fairness, should have the same privilege.

Under the circumstances, pursuant to the provisions of Paragraph 3.61 D of the Rules of The Commission; we respectfully request advise from the Commission as to whether the proposed course of action as indicated in the form annexed hereto, will constitute compliance with the order of July 12th, 1976. We wish to add that:

1. The course of action indicated is not being followed by us and is proposed for the future.

2. The course of action indicated is not under investigation and is not nor has it been the subject of a current proceeding, order, or decree initiated or obtained by the Commission or any other government agency.

We trust to receive an early response.

Respectfully,
UNITED AUDIO PRODUCTS, INC.
/s/ By

Rudolph Taplitz

Letter of Request

April 14, 1977

Dear Mr. Cohen:

United Audio Products, Inc., the marketer of Dual Audio Products, which is operating under the Federal Trade Commission Consent Order of July 12th, 1976, finds itself under a distinct competitive disadvantage in refraining from communicating to its dealers the nationally advertised prices of its products, a practice indulged in by all its competitors, including those operating under an identical F.T.C. Commission Order.

The practice is not intended to suggest or dictate to the dealer the

* Not reproduced herein.

resale prices of the products as is indicated in the preamble to the enclosed proposed notice to dealers,* but is intended to show the comparative value of our products in the market place.

We enclose herewith a copy of a Pioneer Confidential Cost List,* which includes an approximate nationally advertised value. As we have indicated above, Pioneer and Dual are subject to identical F.T.C. orders.

We also enclose a Dual confidential cost list* containing a reference to the nationally advertised approximate values which is proposed to be used.

While we believe that such use is not in violation of the F.T.C. Order, we would like to discuss the matter with you at your office, at your earliest convenience.

We would appreciate your advice as to when we may have an appointment.

Very truly yours,
TAPLITZ & TAPLITZ
/s/ Rudolph Taplitz

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